THE

York Legal Record.

A Record of Cases Argued and Determined in the Various Courts of York County;

Together with Reports and Abstracts of the Most Important Cases Adjudicated Throughout the Commonwealth.

S. C. FREY, EDITOR.

VOLUME II.

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JURISPRUDENCE

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YORK LEGAL RECORD.

VOL. II. THURSDAY, MARCH 10, 1881. No. 1.

OUR SECOND VOLUME.

It is with a feeling of pride that we issue the first number of the second volume of the YORK LEGAL RECORD. One year ago we started out with trembling footsteps, fearing that soon we might fall and perish; to-day we feel strong in stature, believing that our footing is assured. All of this we owe to the sympathy and substantial encouragement of our subscribers in general, and the York Bench and Bar in particular.

OUR WORK.

During the year that has just past, we have reported in full 122 cases, and given comprehensive abstracts of 145 cases. —Many of these cases have been republished in other legal journals, and York County law is becoming known throughout the State. And again, the cases thus reported have been preserved from loss or destruction, and are presented in a form convenient for future use, reference or instruction.

In addition to this, we have brought the legal notices of the County in a small space and clear manner before the eye of every practising Attorney, relieving him from an infinite amount of labor, and rendering mistakes, by reason of overlooking notices, almost impossible.

Our *Index and Table of Cases is one of the most complete ever published. Our legal contemporaries, with the exception of the *Weekly Notes of Cases*, are content with a Table of Cases Reported and an Index giving the subjects only of the cases reported, somewhat on the order of our Index of Cases Abstracted. We have arranged our Index of Cases Reported on the order of that found in the State Reports, giving the syllabi of each case in full, showing at once the point decided; and so arranged, by means of references and cross-references as to render every search as easy as possible. In addition to all this, we also give a Table of Cases Cited and a Table of Cases Abstracted; the former Table is only given by the journal above mentioned—the latter by none. That our method involved the expenditure of much more labor, both for Editor and Printer, is self-evident; if it is of more benefit to our subscribers, then we are amply repaid.

In our Salutatory we stated our objects in starting the RECORD to be "profit, convenience and reference;" profit for ourselves, convenience for the Bar, and reference to the cases therein contained. In regard to the first, the RECORD has paid the expense of publication; the Editor has labored for "glory." This is all that could be expected for the first year, and we are perfectly satisfied. The second object we know, by the expressions of every member of the Bar, has been faithfully carried out. So far as the third is concerned, the fact that cases reported in the first volume have been cited by Bench and Bar, even without an Index to facilitate reference thereto, shows its usefulness for this purpose. May we not say that the RECORD is a success?

But to end what might seem like boasting, let us consider

OUR FAULTS.

A great many more typographical errors have crept into our columns than we had expected, and unfortunately there is no one to blame but ourselves. We will try to have less of these in the future.

The first volume of the RECORD, though containing more reading matter for the price than any other law paper published, is yet rather small for binding purposes, owing to the advertisements being on separate sheets, and therefore discarded in binding. To remedy this, forms one of

*It was hoped that the Index, &c., would be ready this week, but it is found that the work required is much more than was expected. It will be ready next week.

OUR PURPOSES.

We propose to give you more law this year than we did the past. We want to *grow* in stature.

We will endeavor to make less mistakes; it is impossible not to make any.

We will have the RECORD leaded hereafter, as the present number is, thereby presenting a nicer appearance.

We expect to give you over four hundred pages of reading matter during the year. This will make a better-sized volume.

If you know of any important case decided during the past year, that we have not published, send it along, and we will cheerfully give it a place in our columns.

This is in substance what we purpose to do for you this year—make the RECORD even better than it has been. With a continuance of the substantial encouragement that you have already given us, this will prove an easy matter.

But we have already trangressed too far on space that is not ours. Returning our sincere thanks for your kindness, we step down to make room for this year's legal lore.

COMMON PLEAS.

Hinkle v. York County.

Division of Townships—Costs thereof—Liability of County.

The County is not liable for the cost of surveying the line for a proposed division of a township, nor for the pay of the Commissioners appointed to lay out said line.

As by the common law the Crown paid no costs, so the County is not liable unless by statute it is required to pay.

Case stated.

The case stated is as follows:

Amicable action without regard to form, to try whether the County of York is liable to pay the amount of certain bills presented for payment by the plaintiff and refused, the commissioners requesting that the matter should be submitted to the Court for decision.

Case stated for the opinion of the Court, either party to have the right to sue out a writ of error.

The Court of Quarter Sessions of York county at Sessions 1879, on the petition of certain citizens of Heidelberg township and parts adjacent, in the county of York, appointed commissioners to inquire into the propriety of a division of said township.

The said commissioners found it necessary to employ a surveyor, and did employ J. D. Keller to make a survey and draft of said township, (no draft thereof could be found in the Clerk's office,) and the line of the division, etc., who was employed at said service several days, and presented a bill of $28.00 and said bill was assigned to the plaintiff.

The said commissioners were occupied several days in the performance of their duties under said appointment, and presented a bill for $18.90 which bill was also assigned to the plaintiff.

The said commissioners reported in favor of dividing said township as per report filed in said Court of Quarter Sessions, which report and the subsequent action of the Court thereon is made a part of this case.

The said Court after a return of said report in favor of a division, ordered a vote of the qualified electors of said Township to be taken on the question of a division, and said election to be held by the election officers of said Township.

The election was duly held according to law by said election officers and resulted largely in favor of a division, which election return was filed and laid before the Court at the next session thereof, and the Court ordered and decreed a division of said township agreeably to the lines marked out and returned by the commissioners, and that the Township should be named Penn Township. The necessary expenses of said election were $31.25 and the said claim duly assigned to the plaintiff.

That after said Township of Penn was decreed the said court ordered a special election for Township officers to be held, which election was duly held and the expenses thereof $26.00 duly assigned to the plaintiff.

It is admitted that all said sums are reasonable, and the only question is whether the county of York is liable to pay the same or any part thereof.

If the county is liable to the whole amount, then judgment for plaintiff for $104.70 with costs.

If the county is liable to pay only a portion thereof then judgment in favor of plaintiff for such sum as the county is liable to pay, with costs.

If the county is not liable to pay any part of said bills then judgment for the defendant for costs.

V. K. KEESEY,
Attorney for Plaintiff.
FRANK GEISE,
Attorney for the County of York.

March 7, 1881. WICKES, A. L. J. The counsel for the County Commissioners admits the liability of the county for the election expenses incurred in dividing Heidelberg township, but contends that there is no provision of law requiring the county to pay the Commissioners appointed by the Court, or the Surveyor who prepared the draft.

We regret to say the plaintiff's counsel has failed to produce any authority which justifies the imposition of these costs on the county, and we have not, in our research, been more fortunate.

The Act of 24 March, 1803, 4 Smith's Laws 30-1, and that of 15 April, 1834, P. L. 537, both relating to the division of old, and the erection of new townships, are as silent upon the question of costs as is the Act of 24 April, 1857, 1 Purd. 298, under which this controversy arises.

The Surveyor employed by the Commissioners, and whose draft accompanied this report, it is argued is entitled to be paid, by analogy to the authority of a Coroner to employ a surgeon or physician in conducting his inquests. But Gibson, C. J., in Allegheny County v. Watts, 3 Barr 465, distinctly places the right of the physician to be paid upon the ground that being "employed by the Coroner, he was employed by the county." But in the case stated, the county is in no sense a party—the whole proceeding was instituted upon the petition of a few citizens of a township.

But the fact remains that this duty was imposed upon the commissioners by the court, and hence our regret that no provision is made for their compensation.

In the case of Agnes Wilson *et al. v.* The County of York, 1 YORK LEGAL RECORD 6, we took occasion to refer to cases of hardship, where witnesses are brought into Court under the Commonwealth's subpœna, and yet receive no compensation, and we there adverted to other cases of like hardship, which the Supreme Court has said ought to be provided for by the Legislature. But in the absence of such provision, the hardship is in the law, and not in the administration of it. We there said as the conclusion of all our cases on this subject, that as by the common law the Crown paid no costs, so the county is not liable unless by statute it is required to pay.

There is no reason why a different rule should prevail in the civil courts, from that above referred to, where the questions arose out of the administration of our criminal law.

We are therefore of opinion that we have no authority to impose upon the county the payment of any costs set forth in the case stated, except so much as was incurred in holding the election.

And now to wit, March 7, 1881, we enter judgment for the plaintiff for the sum of fifty-seven dollars and eighty-five cents ($57.85) and costs of suit.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Adbitrators—Award of—Scire facias to revive lien of.—An award of arbitrators in favor of the plaintiff, was filed of record, and appealed from by the defendant.—Before the cause was reached for trial in court, the plaintiff issued a *scire facias* for the purpose of preventing the lien of the award being lost by the expiration of five years from the date of its entry.—HELD, that the proceeding was authorized by the Act of April 21, 1880.—*First National Bank of Minersville v. Kauffman,* (Schuylkill C. P.) 2 Schuylkill Legal Record 33.

Common Schools—Illegal orders.—The school directors drew orders on the treasurer "for school books for indigent children," which the treasurer paid; HELD, that the orders, being illegal on their face, were improperly paid by the treasurer who was not entitled to credit therefor in the settlement of his account. —*School District of Pittston township v. Walsh,* (Luzerne C. P.) 10 Luzerne Legal Register 52.

Evidence—Opinion.—An engineer of a railroad company while engaged on the construction of a culvert, gave as his opinion to a by-stander, a stranger to the company, that the culvert was insufficient for the purpose of venting the water of the stream in times of floods. In the trial of an action brought against the company for damages caused by the giving way of the culvert twenty-five years after its construction, the by-stander was permitted to testify as to the declarations of the engineer. HELD, to have been error, that the testimony itself was but the opinion of the engineer as to the sufficiency of the culvert, communicated to another, and that opinion he could give directly to the jury. Its communication to another who was an entire stranger to the defendant, nearly a quarter of a century before the trial, could not suffice to bind the defendant in any manner whatever.—*The Baltimore & Ohio R. R. Co. v. The Sulphur Spring Independent School District,* 11 Pittsburgh Legal Journal 257.

Mortgage—Waiver of limitation.—The intention of a mortgagor to waive the privilege of the limitation given for his benefit by the Act of 1705 should clearly appear.—*Duerr v. Wiederholt et al.,* (Schuylkill C. P.) 2 Schuylkill Legal Record 32.

Practice—Paper Book.—It is a settled rule of practice of the Supreme Court never to reverse for the admission or rejection of a written document, a copy of which is not spread upon the paper book. —*Steel v. Hull et ux;* 11 Pittsburgh Legal Journal 259.

School Director—Extra services.—A school director is not allowed to make any money out of any matter or thing connected directly or indirectly with the common school system, excepting the pay allowed to the secretary and treasurer of the Board.—*McKernan v. School District of West Mahanoy Twp.,* (Schuylkill C. P.) 2 Schuylkill Legal Record 31.

Justice of the Peace—Record of.—In an action against a corporation the return to the summons must show that it was served upon the officers authorized to act for the corporation. When an appearance is relied upon in such action to cure a defective service, the record must show that the appearance was by one authorized to represent the corporation. A return should be sworn to, and not "certified to." The record must show that evidence was heard, whether defendant is absent or present, and should also show the kind of evidence.—*Swartwood v. Exeter Twp.,* (Wyoming C. P.) 10 Luzerne Legal Register 49.

YORK LEGAL RECORD.

VOL. II. THURSDAY, MARCH 17, 1881. No. 2.

QUARTER SESSIONS.

In re Pine Street.

Borough of York — Streets in — Appointment of viewers.

The Borough authorities of the Borough of York, having in due form "enacted and ordained and laid out" Pine Street according to termini and boundaries duly named, presented their petition to the Court of Quarter Sessions, stating that they were about to open said street, and praying the Court to appoint seven viewers to assess the damages for injury and contribution, as provided by the Act of 22 April, 1856. The viewers, citizens of said Borough, were accordingly appointed, and made their report. Upon exceptions filed thereto, HELD:

The Act of 1851 having given the borough authorities power "to lay out, enact and ordain such streets, lanes, alleys, &c., as they may deem necessary, and to provide for, enact and ordain the widening and straightening of the same," and also "all needful jurisdiction over the same," it is not necessary to appoint viewers from adjoining townships to determine whether a street laid out in said Borough is necessary or not.

There remains nothing for the viewers to do except to determine the question of damages to property injured and assess contribution for that benefitted; and hence neither the general nor local road law applies.

The Act of 3 April, 1856, which furnishes necessary machinery for this purpose, is applicable to the Borough of York, 1st. Because it is a supplement necessary to the execution of that part of the Act of 1851 which has been made part of the Borough charter; 2d. Because it applies to *all* Boroughs where the authorities are about to open a street.

A municipal corporation takes not only what is granted in express words, but also what is necessarily implied or incident to the power expressly granted; and further, those essential to the declared objects and purposes of the corporation.

Exceptions to report of viewers.

This is the fifth time that "Pine Street" has occupied the attention of the Court, in one shape or another. Thrice the portion in dispute was that extending from Philadelphia Street to Market Street, in the Borough of York. (See *In re Pine Street*, 1 YORK LEGAL RECORD 133; *Extension of Pine Street, id.* 21.) The next dispute was in regard to the opening of said street from Market Street to King Street, and in that case the report was set aside, owing to the disqualification of one of the viewers. The exceptions to the present report were taken on the grounds set forth in the Court's opinion.

H. C. Niles, James Kell and James W. Latimer for exceptions.

Delegated powers of eminent domain must be strictly construed:

Dillon on Municipal Corporations 569, pl. 469.
Com. v. E. & N. E. R. R. Co., 3 Casey 359, 351.
Reitenbaugh v. R. R. Co., 21 P. S. R. 100.

Boroughs subject to the whole act of 1851 took no power to *open* streets:

Act of 3 April 1851, P. L. 326 § 27.
Purd. Dig. page 173-4, pl. 91.

Power of Borough over streets, under General Borough law:

1 Purdon 171, pl. 67.
1 Purdon 172, pl. 76.
1 Purdon 174, pl. 93.
1 Purdon 173-4, pl. 91.
2 Purdon 1272, pl. 3, 1273, pl. 4.
1 Purdon 173, pl. 89.
2 Purdon, 1273, pl. 8.
Sharett's Road, 8 Barr 89.

None of these provisions apply to the Borough of York. Therefore, the General Road Law must apply:

Newville Road, 8 Watts 175.
Sharett's Road, 8 Barr 89.
Road in Mercer, 14 S. & R. 447.

Or the special law for the county:

Road in Milton, 4 Wright 300.
Lancaster Road, 18 P. F. Smith, 396.

The act of 22 April, 1856, is not a substitute for this method of opening streets:

Somerset & Stoystown Road, 24 P. F. Smith 61.

And does not apply to this borough.

Under the General Borough Law, part of these damages would have to be paid by the County, and part by the Borough:

1 Purdon 174, pl. 93.
2 Purdon 1273, pl. 8.
Sharett's Road, 8 Barr 89.
Road in Milton, 4 Wright 300.

The acts of 1851 and 1856 only repeal so much of the General Road Law as they supply:

Somerset & Stoystown Road, 24 P. F. Smith 61.

Blackford & Stewart and E. W. Spangler for report.

The act of 22 April, 1856, gives the Borough authorities exclusive power to lay out a street, and vested in the viewers appointed by the Court the authority only to assess the damages and levy the contributions created by the opening of the street.

The adoption by the corporate authorities of the second section of the act of 1851 and all it embraces, includes by implication the Act of 1856:

In re Vacation of Osage Street, 9 Norris 117.

The act of 1860 did not operate as a repeal of the acts of 1851 and 1856, so far as the Borough of York was concerned:

Somerset & Stoystown Road, 24 P. F. Smith 61.
South Chester Road, 30 P. F. Smith 370.

The Borough having accepted the provisions of the act of 1851, is subject thereto:

South Chester Road, 30 P. F. Smith 370.
Road in Milton, 4 Wright 301.
Sharett's Road, 8 Barr 89.
Callowhill Street, 8 Casey 361.

The title is no part of the act:

1 Kent's Commentaries *460.
Com. v. Slifer, 3 P. F. Smith 71.

The parties injured have a right to appeal from the assessment of damages:

Art. 16,§ 8, Constitution of 1873.
Act of 13 June, 1874, P. L. 283.
Pusey's Appeal, 2 Norris 67.
Williams' Executors v. Pittsburgh, 2 Norris 71.
Bachler's Appeal, 9 Norris 207.

March 7, 1881. FISHER, P. J., and WICKES, A. L. J. It is contended by those who have filed exceptions to this report that the municipal authorities have no power to open new streets in this borough, in the manner, at all events, in which it is sought to be done in this instance, and that the act under which the viewers were appointed was never extended to this borough, and does not, therefore, warrant the action of the Court in appointing them.

By the act of 20th April, 1854, the second section of the act entitled "an act for regulating Boroughs within this Commonwealth," approved April 3rd, 1851, was made a supplement to the charter of the borough of York, except the 20, 24. 25 and 26 articles.

By the act of 27th April, 1855, the 24 article above excepted, was also made part of the borough charter.

Among other provisions contained in said second section of the act of 1851, and made application to this borough, the corporate authorities are given the power "to lay out, enact and ordain such roads, streets, lanes, alleys, &c., as they may deem necessary, and to provide for, enact and ordain the widening and straightening of the same;" and by a subsequent section they are given "all needful jurisdiction of the same."

Believing they had the right to do, precisely what the act of assembly authorizes, the Chief Burgess and town council have decreed that the public convenience requires that Pine street in this borough shall be extended, and they have in due form enacted, ordained and laid out such extension, defining its termini, and its boundaries, its courses and distances; this action has been formulated in an ordinance, and now desiring to exercise "the needful jurisdiction" over the street so laid out, enacted and ordained, they have presented their petition to the Court of Quarter Sessions, stating that they are "about to open" the said street, which is fully described, and praying the court to appoint seven viewers to assess the damages for injury and contribution, as provided by the act of 22nd April, 1856. The report of the viewers appointed on that petition is now before us under exceptions.

It is contended, first, that after the municipal authorities have ordained and laid out a street, that certain steps must be taken before they can place themselves in a position to be "about to open it."

Precisely what steps are necessary, or are meant, we do not know, unless it be that viewers must be appointed under the general road law of 1836, or under our local road law of 1860. But what could such viewers do, that has not already been done? Certainly it would seem odd enough to call in "six gentlemen" from the neighboring townships, under the act of 1836, or three, under our local law, to determine whether the street already "laid out, enacted and ordained" by competent authority, "and deemed necessary" is really necessary or not.

The danger of such a course is clearly pointed out by Mr. Justice Woodward in In re Vacation of Osage Street, 9 Norris 117, in which he says:

"The adjustment of a city or borough plan requires scientific knowledge, a pervading system thoroughly understood by official agents, and familiarity with diversified and minute details. * * * Legislation should be very clear indeed to require that the health, convenience and comfort of a whole community should be put to the hazard of the action of six gentlemen, casually selected from country townships, adjacent to a town, to deal with an isolated detail of a system which they could touch only to injure and perhaps destroy."

We are not unmindful of the argument that a corporation takes nothing by implication, and that the right to lay out, enact and ordain and to exercise needful jurisdiction over streets, does not carry with it the right to open.

We are not by any means sure, that the principle invoked can be relied on in this instance.

A municipal corporation takes not only what is granted in express words, but also what is necessarily implied, or incident to the power expressly granted; and further, those essential to the declared objects and purposes of the corporation. —This is hornbook law, and authorities need not be cited to sustain it.

Said Chief Justice Taney, "a charter must be fairly examined and considered, and reasonably and justly expounded," and the reasoning of Mr. Justice Strong in Boyle *v.* Phila. & Reading R. R. Co., 4 P. F. S. 316, where he illustrates the rule we here contend for, is not without point and force in this connection.

In the Osage street case above cited, much stress was laid upon the words "and have all other needful jurisdiction over the same," and they have quite as great significance when a street is to be opened, as when one is to be vacated.

Is it a strained and unreasonable construction of the power given to this municipal body, that it carries with it the power to open streets, provided no private right is infringed without such compensation as the law provides? Any other construction involves the legislature in the absurdity of solemnly granting a power to ordain, enact and lay out streets, and exercise all needful jurisdiction over them, which could never be opened.

If then nothing remains to be done by viewers except to determine the question of damages to property injured, and assess contributions upon that benefitted, and we can conceive of no other function devolving upon them, neither the general road law nor the act applicable to this county (1860 P. L. 61), supplies the procedure necessary to enable the borough officers to execute the power conferred upon them by the act of 1851.

As we took occasion to say a year or two ago, when part of this street was opened, it is manifest that while certain property is injured by the opening of streets, it is quite as certain that other property is benefitted, and hence the necessity of assessing contributions as well as damages.

But the road laws furnish no machinery by which this can be done. Indeed, it was never intended that the streets of this borough should be opened under them. (See Section 47 of original charter.)

Are the borough authorities then without means of opening streets, which they have solemnly enacted, ordained and laid out? The act of 3 April, 1856 (P. L. 525) furnishes an adequate remedy for the difficulties which are said to arise just at this point. It provides for all the steps taken in this case, after the jurisdiction of the Court attached. We need not recite its provisions—they are ample to protect the public convenience, and the rights of individuals alike. The argument is that the act has no application to this borough, because it is entitled "a supplement to the act regulating Boroughs, approved April 3, 1851."

And it is said that being a supplement to an entire act, it cannot apply to part only of the original law. But why shall we resort to the title to ascertain the meaning of the law? The title was no part of the act at the time this statute was approved; the language could not be broader or plainer, if the most general terms in the vocabulary had been sought after—"that hereafter, whenever the burgesses and town council of *any borough* shall open or be about to open, any streets or alleys therein," and then proceeds to define what shall be done by the "burgesses and town council," after they have done all that they could do, under the second section of the act of 1851. Shall we then reject the body of this act, because by its title it is called a supplement to the act of 1851, when only part of that act is applicable to this borough? We think not for two reasons:

First, it is a supplement necessary to the execution of that part of the act of 1851, which has been made part of the borough charter, and

Second, it applies to all boroughs where the authorities are about to open a street; and it is not perhaps material whether they arrive at this point, by virtue of original jurisdiction in themselves, or by the action of the court under the general or local road law. That the title of the act cannot control its operation in a case like this, is decided in Slifer *v.* Commonwealth 3 P. F. S. 11.

These acts together with that of 1874, (P. L. 283) which gives to the owners of property taken or injured, the right to appeal from the assessment of damages, affords the borough a complete and convenient system, while the rights of individual citizens are carefully guarded.

If, on the contrary, it is true, as argued, that the acts, as herein set forth, do not apply, and that the streets heretofore opened under their authority were illegally opened, it is difficult to say precisely what the consequences will be; certainly one of them is, that this borough, with its population of fourteen thousand people, is without authority to open a street or an alley, or to widen or straighten those already opened. We think the law has not left the borough officers in this condition.

Exceptions have been filed to the amount of damages assessed, but as appeals have been taken, under the act of 1874, above referred to, they are not before us for our determination.

We think the objection that no provision is made for the payment of damages, is without force. Those whose property will be taken are entirely secure, under the 8th Section of Article 16 of the Constitution and the act of 1874, (P. L. 283).

We therefore dismiss the exceptions and confirm the report.

Ex-Governor Robinson, of Kentucky, is a relic of the old *regime* of Virginia gentlemen, stately, courteous and punctillous in exercising the rights of hospitality. One day he had invited Judge Duvall to ride with him. Arrived at a toll gate, the Judge was about to pay the toll, when Governor Robinson interposed, saying: "Duvall, I have been trying for years to make a gentleman of you, but have not succeeded. When a gentleman asks you to ride he does not expect you to pay expenses." At this serio-comic address from his old friend, the Judge laughed quietly, and returned his pocket-book to its place. A part of their route lay through farms, with several gates to open. Reaching the first gate, Duvall sat still, while the governor waited for him to descend and open the gate. After waiting a minute, during which neither spoke a word, Duvall said with a merry chuckle in his voice: "I would get down and open that gate, but I suppose that when one is asked by a gentleman to take a ride he is not expected to work his way." The governor silently and solemnly descended and opened the gate.

Mrs. Apollonia Threedouble is the name of a Louisville litigant.

YORK LEGAL RECORD.

Vol. II. THURSDAY, MARCH 24, 1881. No. 3.

COMMON PLEAS.

Peach Botton School District v. Swagert et al.

Opening of Judgment—Technical Defence.

In an action against the surety of a receiving officer, the defendant is entitled to have the monies received and paid by the officer, during the year he was surety, appropriated to his relief, although it may appear that the officer was a defaulter for several preceding years.

The fact that the judgment was entered in the name of the "Peach Bottom School District," instead of "School District of Peach Bottom," is no ground for opening it.

Rule to set aside *fi. fa.* and open judgment.

The judgment in this case was entered by the plaintiff against the defendants, one of whom was a collector of school taxes for that district for two years, the remainder being his sureties; the collector having been "short" in his accounts.

The principal grounds set forth in the petition to set aside, &c., were that the collector applied monies received on tax duplicates for the second year to the payment of taxes for the first year to the detriment of his sureties for that year; and that the suit is brought by the Peach Bottom School District instead of the School District of Peach Bottom.

Blackford & Stewart for rule.

There is no such corporation as plaintiff:

1 Purdon 242, pl. 238.

The amount collected on the last duplicate and applied to the payment of the first was $386.72. The sureties upon the second bond had the legal right to have this money applied to the payment of taxes upon the duplicate from which it was collected:

Com. *v.* Reitzel, 9 W. & S. 109.

When the tax collector paid the money collected upon the second duplicate to the proper recipient of the taxes, it was beyond his control; and having reached the hands of the Treasurer of the School Board, the condition of the bond was fulfilled.

Cochran & Hay and H. W. McCall, contra.

As to the appropriation of payments:

Stewart *v.* Keith, 2 Jones 238.
McKee's Executor *v.* Commonwealth, 2 Grant 23.
McMicken *v.* Commonwealth, 8 P. F. Smith 221.
Speck *v.* Commonwealth, 3 W. & S. 324.
1 American Leading Cases 278—283.

March 7, 1881. WICKES, A. L. J. Under the authority of Commonwealth v. Reitzel, 9 W. & S. 109, the defendants are entitled to have the matters of fact alleged by them submitted to a jury.

The technical defence is not, we think, well taken, and if it was, ought not to be permitted at this stage of the case.

The suit is brought by the Peach Bottom School District, instead of the School District of Peach Bottom, as it is said the Act of 1854 (1 Purdon 242, pl. 38) requires.

The bond is to the Peach Bottom School District, and the corporation plaintiff is "nominated" in the suit, precisely as in the bond.

If such a bond cannot be enforced by suit, it will be most disastrous to the enormous interests protected by such instruments; for the blank form of bonds issued to the school districts of this county are in this regard precisely similar to those used in other parts of the commonwealth. They have not heretofore been questioned, and it is too late to commence an inquiry of that character, in the present case, after judgment; Porter *v.* Cresson, 10 S. & R. 257; Fritz *v.* Commissioners, 5 Harris 131; 9 Casey 363. Besides which, a court has the power to impose terms upon those who ask its indulgence (3 W. & S. 272; 6 W. & S. 217; 3 Barr 501), and we regard this as a proper case in which to exercise it.

A mere technical defence should not be allowed in opening a judgment.

We will therefore set aside the *fi. fa.* and open the judgment in this case, and let the defendant into a defence upon the merits.

The said defence to be limited and confined to the matters set forth in the appli-

cation to open, except so much thereof as denies the right of the plaintiffs to sue by the corporate name of the Peach Bottom School District, or questions the legality of the bond upon which judgment was entered.

Sheehan v. Frederick.

Attachment—Foreign Corporation.

An attachment will not lie against a foreign corporation, having no legal existence, property or place of business in this Commonwealth; although the officers have their private residences therein.

Rule to dissolve attachment.

The attachment execution in this suit was served on the officers of the Baltimore and Hanover Railroad Company, as garnishees. The company is chartered under the laws of Maryland, owns no property in this State, and has its place of business at Westminster, Md., but the officers reside in Hanover, Pa.

David Wills for rule.

James Kell, contra.

March 7, 1881. WICKES, A. L. J. The principle involved in this case was decided by the present Chief Justice in the District Court of Philadelphia, in December, 1849 (2 T. & H. 526, note 4).

It was shown on the argument that the garnishee is a foreign corporation, chartered by the legislature of Maryland, having no legal existence, no property or place of business in this Commonwealth.

It matters not that the officers attached have their private residences in this county; they were served, according to the Sheriff's return, in their official character, and in that capacity alone could they be proceeded against.

But the proceeding is *in rem,* and the property sought to be attached is not within the jurisdiction and power of the Court; Christmas *v.* Biddle, 1 Harris 223. We could not therefore enforce a judgment against the garnishee, which is perhaps the best argument that could be employed to show want of jurisdiction.

The rule must be made absolute.

C. P. of Chester Co.

County of Chester v. Coatesville Gas Co.

Gas Company—Taxation of real estate of.

A lot of land owned by an incorporated gas company on which are erected its works for manufacturing and distributing gas, and used only for that purpose, although necessary and indispensable therefor, is liable to taxation for county purposes under the Act of May 14, 1874. (P. L. 158; Purd. Dig. 1857.)

That the real estate in question was paid for out of, and comprises a part of, the capital stock of the company, does not relieve it from such taxation.

This was an amicable action and case stated for the opinion of the court to determine the liability of the defendant for county tax on the real estate in question. It appeared by the case stated that:

The defendant is a corporation chartered by special act of Assembly in 1868, "with the right and authority to supply the Borough of Coatesville and its vicinity with gas light." By its charter, which is agreed to be a part of the case stated, it is declared to be managed, subject and entitled under the general Act of Assembly of 1867, relating to gas companies, and its supplements.

Among other property, the defendant owns a lot of land in the Borough of Coatesville, on which is erected a brick building, containing its furnaces, retorts and machinery for manufacturing gas, and its reservior for retaining and distributing the gas through pipes along the streets through the Borough of Coatesville. It is agreed that the lot and improvements are used only for the manufacturing and supplying of gas according to defendant's corporate powers, and that they are necessary and indispensable therefor.

It is further agreed that the defendant is a stock company, whose revenues exceed its expenses, declaring dividends to its stockholders; and that the lot aforesaid with the improvements thereon are a part of the capital stock of the corporation defendant, and are wholly included in the same, and as such pay the usual state tax to the Commonwealth. The stock of the corporation defendant is owned by a considerable number of individuals who are liable to and pay tax

thereon to the state, and to the county plaintiff.

FUTHEY, P. J. Under the decision of the Supreme Court in the case of the West Chester Gas Company *v.* The County of Chester, 6 Casey, 232, the real estate in question would not be taxable.

The question presents itself, however, whether it is not made taxable by the provisions of the 1st and 2d sections of the 9th article of the Constitution of 1874, and the Act of Assembly of the 14th of May, 1874, passed to carry out these provisions. The first section referred to provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the same, and shall be levied and collected under general laws, and then declares what property the General Assembly may, by general laws, exempt from taxation; and the 2d section declares that all laws exempting property from taxation other than that thus enumerated shall be void. The Act of Assembly enumerates what property shall be exempt, and then provides that all property, whether real or personal, other than that which is in actual use and occupation for the purposes aforesaid, and from which any income or revenue is derived, shall be subject to taxation, except when exempted by law for state purposes, and "nothing herein contained shall exempt the same therefrom."

The property in question is not embraced in either of classes specified as exempt, and without more appearing is, under the terms of the proviso, subject to taxation.

It is argued, however, that the principle settled in the series of cases commencing with the Lehigh Coal & Navigation Company *v.* Northampton County, 8 W. & S. 334, on the subject of the taxation of such property, still governs, notwithstanding the provisions of the Constitution and Act of 1874, and is not affected thereby; and, further, that inasmuch as the stock of the defendant is taxable, that this real estate, which forms part of the stock, is not taxable.

An examination of the line of authorities referred to, shows that the lands and property belonging to corporations held to be exempt from the payment of taxes, was not because they were purchased with its capital stock on which taxes were assessable. In every case there was something in the nature of the corporation or the character of its business, which entered into the decision. In some of the cases certain property was declared exempt from, and other property subject to, taxation, although both were purchased with the capital stock. The principle seems to have been, that property necessary for the enjoyment of the franchise, was declared not taxable. Thus in the Lackawanna Iron & Coal Company *v.* The County of Luzerne, 6 Wright 424, it was held that the public works of a corporation used as such, with their necessary appurtenances were exempt from taxation; but that houses, lands, and other property held for its private purposes, even although purchased with its capital stock, were not exempt. See also Railroad *v.* Berks County, 6 Barr 70; Wayne County *v.* The Canal Company, 3 Harris 351; Cambria Iron Co. *v.* Carbon County, 3 Wr. 251.

The reason of the decisions was that the Legislature did not intend to tax the works necessary to carry on the operations of the corporations—that they were not subject to or embraced within the operation of the tax laws; and not because they formed part of the capital stock, for that, as is apparent, would have rendered all the real estate in which they invested their capital exempt; and the decisions, as we have seen, draw a distinction between that necessary and that simply convenient, holding the latter subject to taxation and the former not. The property in question is not, therefore, under the decisions, exempt, because it was purchased and the improvements thereon made with a portion of the stock of the company.

The question then recurs, what is the effect of the Act of Assembly of 1874,

passed to carry out the provisions of constitution? We are of opinion that thereby all property not specifically enumerated as exempt, and from which any income or revenue is derived, is made taxable for county purposes and embraced within the operations of the tax laws. It required no additional legislation to make it so. If not taxable, therefore, the Act removed the barrier, and placed it in the same category as other property, and taxable under the general laws in operation. Such appears to us to be the plain and obvious intent of the Act.

If the effect of this is to subject certain property to double taxation because of the different shapes in which it is presented to the assessor, it is no more than has been upheld by the decisions referred to, with regard to real estate forming part of the capital stock of corporations, and yet declared taxable because not necessary to the operations of the corporation, while the stock thus invested was liable to taxation also. If this result should seem to be inequitable, the legislative power must correct the evil.

We cannot say that this real estate, because purchased and improved with the stock of the company, should not be taxed, any more than we can say the stock itself should not be taxed because invested in this real estate.

The question raised in this case is discussed in one of its aspects by the Supreme Court in the case of Chadwick *v.* Magines, 8 W. N. C. 451, and we simply carry to its legitimate conclusion the principles of that decision.

Let judgment be entered for the plaintiff on the case stated for $19.80 with costs.

THE oldest friend to the profession is said to be the man who makes his own will.

PROTESTED BILLS—Posters on forbidden walls.

A YANKEE is good at guessing, but an Englishman is "Best on Presumption."

Rules of Descent in the United States.
As laid down by Kent in 1831.

1. If one dies owning an estate,
It lineally must gravitate,
If but one heir, it will annex
To him or her in spite of sex;
If there be more, as well there may,
They all shall take "per capita."

2. But if degree, perchance there be,
Of different consanguinity,
As sons and grandsons, all shall take,
And an estate in common make;
But such grandsons have cause to fear it,
They'll not an item more inherit
Than would have been their father's share,
Had he been the living heir.

3. But if the owner meets his fate—
No lineal heir to his estate,
We've dared the common law to mend,
And his estate shall now ascend.

4. Again: in case the owner do
Lack issue, and lack parents too,
His brothers and his sisters shall
Succeed by rules collateral.
If brothers, sisters, nephews, nieces,
They then will take in equal pieces;
If some be dead, some living be,
They'll take by nearness of degree.

5. And in default of father, mother,
And nephews, nieces, sisters, brother,
Or issue, the estate can't fall,
But yet it will rise above them all.

6. Again, and if perchance there shall
Be no descendants lineal—
If parents, brothers, sisters, none,
With their descendants neath the sun,
Nor the grandparents, the estate
Shall, by unerring legal fate,
Unto the aunts and uncles wend,
And those who from them may descend;
If equally related, they
Will take their part "per capita."
But if in different degrees,
They all shall then take "per stirpes."

7. Provided, if the intestate had
Derived his living from his dad,
It shall to aunts and uncles slide,
And issue on the father's side;
And if none such there be perchance,
Then to the uncles and the aunts
On the maternal side 'twill go:
And this rule works "e converso."

8. This 8th last rule, it seems to me,
Is rather stiff for poetry.

—Southern Law Journal.

YORK LEGAL RECORD.

Vol. II. THURSDAY, MARCH 31, 1881. No. 4

OBITUARY.

D. BIGLER BAILEY, Esq.

On Saturday, March 26, 1881, at 1:30 P. M., D. Bigler Bailey, Esq., a member of the York County Bar, departed this life, aged about 30 years.

Mr. Bailey was born at Dillsburg, York County, Pa., being a son of S. N. Bailey, Esq., of that place. He was the youngest of three brothers, all of whom entered professional life, the oldest, John N. Bailey, Esq., being engaged in the practice of law in Huntingdon, Pa., while the second brother is Dr. Wm. D. Bailey, a practising physician at Dillsburg.

Mr. Bailey received his education in the common and select schools of the county, and early in life was engaged as a teacher in the public schools of the county, and later in those of York Borough. While teaching in this place, he began the study of law with W. C. Chapman, Esq., and after passing a rigid and highly creditable examination, was admitted to the Bar on August 25, 1873. He at once entered upon the practice of his profession and was rapidly working his way upward when called away. He took an active part in the politics of the county, and at the time of his decease was counsel to the Sheriff and County Auditors.

Mr. Bailey was a gentleman of eminently social qualities, and won for himself the friendship and esteem of all who knew him. His was a nature that infused vim and earnestness in everything with which he was connected, and never disheartened by apparent failure, his courage and enterprise often turned defeat into victory, and reaped success for the cause in which he was interested.

In his professional life, his cases always showed high natural abilities united with careful application, and a clear comprehension of the questions involved. His argument for the defence in the case of Com. *v.* Smith, indicted for murder, was an able production, and attracted considerable attention throughout the county at the time of the trial.

Physically, Mr. Bailey was a man of fine appearance, well developed, and apparently in the possession of a strong constitution and excellent health, until the sudden and unexpected illness, which ended in his decease.

A meeting of the Bar was held on Monday, March 28, 1881, at 10 o'clock A. M., to take proper action relative to his death. The meeting was organized by electing Hon. Robert J. Fisher as Chairman, and D. K. Trimmer, Esq., as Secretary. A committee on resolutions, consisting of Messrs. Blackford, V. K. Keesey, Chapman, Gibson and Maish, was appointed, who presented the following report:

Resolved, That in the death of D. B. Bailey, Esq., the Bar of York County has lost a member of great promise, a kind and courteous brother, the amenity of whose manners has made him justly popular with his brother members of the Bar, and that his associates mourn in common with his fellow townsmen the departure of Mr. Bailey in the springtime of life and in the pride and strength of early manhood.

Resolved, That the Bar tenders their sympathy to the family of its deceased friend and associate in their present affliction.

Resolved, That a committee of three be appointed by the presiding officer, who shall communicate to the family of Mr. Bailey the resolutions now adopted.

Eulogistic remarks were made by Messrs. Gibson, Wanner and Maish, after which the resolutions were adopted.

A motion to attend his funeral in a body was unanimously carried, as was also a motion ordering the resolutions to be spread on the records of the Court.

The meeting then adjourned.

SUPREME COURT.

Smith v. Thomas.

Stock contracts—Gambling.

A contract to purchase shares of stock without the intention to deliver or receive them is a gambling contract.

Error to the Court of Common Pleas No. 4 of Philadelphia county.

March 7, 1881. GORDON, J. An inspection of the evidence of the plaintiff, will, of itself, reveal the fact that there was a mistrial of this case in the court below.

Thomas swears that he sold for Dickson five hundred shares of Pennsylvania Railroad stock, short, and so Thomas further on explains by saying that at the time he professed to sell this stock he had no such stock in his hands to sell. Nevertheless, he says when he sold these five hundred shares he delivered them. This anomalous kind of testimony he explains by saying that this delivery was made on the clearing house sheet, which means a mere settlement of differences. It appears also from this same testimony that, in order properly to keep up appearances, when the time came for delivery he had to borrow five hundred shares of stock from somebody, whose name does not appear, and of these there was no actual delivery, but, as the witness says, it came through the clearing house sheet. All this means, in common parlance, that Thomas sold for Dickson five hundred shares of stock, which Dickson at that time, neither had, nor intended to have, and that under the pretense of meeting this contract when it fell due, Thomas pretended to borrow five hundred shares which were not delivered to him; that this altogether fictitious transaction was accomplished through the agency of the clearing house, and was one in which no other parties were known but Thomas and Dickson, who were to account to each other for differences only.

In order to show that in this we are not mistaken, and that the confirmation may proceed from the plaintiff's own mouth, we subjoin the following evidence, to wit: "Q. Did not you upon, a former trial in this case, say, and have you not said it twice, we only pay the difference or receive the difference; we do not actually deliver the stock? Ans. That is, for our clearing house certificate balances, we only pay the difference or receive the difference. If we have something coming in on one side that is going out on the other, of course we merely pay the difference. Q. Did you act as a broker for Mr. Dickson in this sense? Ans. Did I act as a broker? Yes, sir. Q. When you and the defendant, Mr. Dickson, had this understanding as you have explained it, was it not understood by you and the defendant that there would be no actual delivery of the stock by you to him or by him to you, but that he was to receive the difference from you, in case the price of stock went down or was to pay the difference to you in case the price went up? Ans. Yes, sir. Q. That is, if there was any loss he was to pay? Ans. Yes, sir. Q. And if there was any profit you were to hand it over to him? Ans. Yes, sir."—Again, further on: "Q. Have you not testified that at the time Mr. Dickson directed you to sell this stock, that it was understood between you and him that there was to be no actual delivery of the stock by you to him or by him to you, but that he was to protect you from loss if the stock went up, and that he was to receive the difference from you in final settlement if the stock went down; did you not say that? Ans. That certainly was the understanding."

Confessedly then this was a dealing in differences or margins, a wagering contract, and therefore, utterly void.

There was here no question as to a *bona fide* time contract upon which the jury was called to pass; neither does it involve, as the court below erroneously imagined, the question of agency, for there were but two parties who were mutually engaged in stock jobbing, and who were to settle with each other, and not with some third party. Moreover,

we are somewhat surprised that the learned judge who tried this case should have regarded the recent decisions of this court upon this subject, as not only novel, but doubtful. We can assure him that they are obnoxious to neither of these charges.

As early as Pritchet *v.* The Insurance Company of North America, 3 Yeates 458, it was ruled that whilst the British Statute of 19 Geo. II., c, 37, did not bind us *proprio vigore*, yet that that system of National policy which aimed at the suppression of wagering policies. had, even at that period, been adopted by our courts. And in Edgell *v.* McLaughlin, 6 Wharton 176, it was said by Mr. Justice Sergeant, that it was fortunate for Pennsylvania that there was in its highest tribunal, no decision favorable to the recovery of a wager, and that the only decision then existing upon the subject was expressly in point to the contrary. Between this case and that of Brua's Appeal, 5 P. F. S. 299, we have very many decisions condemnatory of wagering contracts, in the way of betting on horse races, elections, &c., &c.

Brua's Appeal is in point, however, upon the very matter in controversy. It was there held, that a contract to purchase shares of stock without the intention to deliver or receive them was a gambling contract. Mr. Justice Thompson, who delivered the opinion in that case, made use of the following words: "It is said, the form in which this contract appears enters largely into the business of stock brokerage; this is a mistake: the *bona fide* purchase of stocks, no doubt, can be conducted in a legitimate way, and is so, generally, without trenching in the least on the gambler's province. If this be possible, however, the fewer licenses that are issued for such a business the better.—Anything which induces men to risk their money or property, without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community, no matter by what name it may be called."—Then we have Smith *v.* Bouvier, 20 P. F. Smith 325, in which Brua's Appeal is approved, and the distinction noted between *bona fide* time contracts and those of a purely wagering character. Next in order comes Fareira *v.* Gabell, 8 Norris 89, in which we have a *per curiam* opinion, adopting the very clear and satisfactory opinion of Judge Hare, of the court below, and approving Smith *v.* Bouvier and Brua's' Appeal. Then comes North *v.* Phillips, 8 Norris 250; Gheen, Morgan & Co. *v.* Johnson, 9 Norris 38; and last of all, Ruchizky *v.* DeHaven, but recently delivered. [Abstracted on the next page.]

Furthermore, he is entirely mistaken in his supposition, that, on this subject, there is a want of harmony between our courts and those of Great Britain. This very same doctrine was held in Grizewood *v.* Blane, 2 J. Scott, 11 Com. B. 526, a case which exhibits the ready disposition of the British Courts to follow the leading of their own statute 8 and 9 Vict. 109, upon this subject. Jarvis, C. J., left the question to the jury to say, "whether either party meant to purchase or sell the shares in question," telling them, if they did not, the contract was, in his opinion, a gambling transaction, and void. On a motion afterwards for a new trial, the opinion of the Chief Justice was sustained, Justice Cresswell, among other of the judges, saying: "As to the evidence, I think it abundantly warranted the jury in coming to the conclusion that there was no real contract of sale, but that the whole thing was to be settled by the payment of differences. It clearly was a gambling transaction within the meaning of the statute."

Now, the only real difference between this case and the one in hand is this, that in the case cited, there was something to submit to a jury, whilst in the one now under consideration there was nothing so to submit; the plaintiff himself, by his own testimony, having stamped the transaction with the brand of illegality.

Of the remaining exceptions, it is un-

necessary for us to speak, since what has already been said effectually disposes of this case.

Judgment reversed.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Action—Bar to.—An award on *scire facias* to mechanic's lien of "no cause of action" is a bar to a personal action between the same parties with reference to the same subject matter.—*Richardson's Estate,* (Allegheny O. C.) 11 Pittsburgh Legal Journal 91.

Affidavit of defence—Sufficiency of.—An allegation in an affidavit of defence that the note was obtained "by false and fraudulent representations," without more, is insufficient.—*Snyder v. Whann,* (Chester C. P.) 1 Chester Co. Reports 169.

Infant—Contract of.—The doctrine that where an infant has executed a contract, and has enjoyed the benefit of it, and afterwards, on coming of age, seeks to avoid it, he must first restore the consideration which he received, applies in some cases, but as a general rule it is unsound.—GORDON, J., in *Ruchizky v. De Haven,* 38 Legal Intelligencer 115.

Justice of the Peace—Appeal from.—In an action of trespass for injury to realty, the plaintiff asked and recovered $5.00 damages; the injury being itemized, upon cross-examination, aggregated more than $5.33. HELD, not sufficient to entitle the defendant to an appeal.—*Wallace v. Hickory,* (Chester C. P.) 1 Chester Co. Reports 166.

Mortgage — Desertion of wife. — A mortgaged his property, and then deserted his wife; the property was afterwards sold by the sheriff on proceedings on the mortgage and purchased by B. HELD, on bill in equity filed by A's wife, asking to have the mortgage declared null and void, under the Acts of 1718 and 1855, and to restrain B from setting up any title to the property, that there being no proof of the knowledge of the proposed desertion brought home to B, the bill should be dismissed.—*Duquesne Saving Bank's Appeal,* 38 Legal Intelligencer 114.

Stocks — Dealings in—Margins—Minority.—Transactions in stocks by way of margins, settlement of differences, and payment of the gain and loss without the intention to deliver the stocks, are mere wagers, and cannot be sustained. Money received by a stock broker from a minor, to carry on such transactions, may be recovered back from such stock broker.—Such a contract is void *ab initio.* The stock broker is not the agent of the minor, but is the party with whom the minor made the alleged contract.—*Ruchizky v. De Haven,* 38 Legal Intelligencer 115.

Tavern keeper—Liability of Sureties of.—A fine imposed upon a tavern keeper for keeping a disorderly house cannot be collected from the sureties of his bond.—But upon a conviction for selling liquor to minors or committing any other offence under the Act of April 12, 1875, the fine and costs of prosecution can be collected from such sureties, although the principal may have suffered imprisonment for the three months prescribed in the Act. — *Com. v. Fendler et al.,* (Dauphin C. P.) 12 Lancaster Bar 12.

Will—Construction of.—S directed by his will that a certain sum of money should remain secured in his real estate, the interest thereof to be paid yearly and every year to his daughter M., and after her decease to be paid to her heirs or legal representatives. HELD, payable to her next of kin who were such at her decease.—*Shuman v. Walker,* (Chester C. P.) 1 Chester Co. Reports 170.

YORK LEGAL RECORD.

VOL. II. THURSDAY, APRIL 7, 1881. No. 5.

ORPHANS' COURT.

Illias' Estate.

Infant—Contract of—Ratification.

An administrator paid money belonging to a minor child of the decedent, with her knowledge and consent to another person not her guardian. After the minor became of age, she took no action in regard to this money for a period of nearly two years, except to write a letter to the person who received it, in which she said she wanted her money. In the mean time the administrator filed his account and it was confirmed, without exceptions being filed to it. In the account the administrator took credit for the sum of money so paid during her minority. HELD, that the infant was entitled to recover from the administrator the amount of money so paid by him.

A promise to take a case out of the statute of limitations or to affirm an infant's contract, must be made to the party in interest or to his agent.

A bare neglect to disaffirm a contract, is not of itself a ratification.

Exceptions to Auditor's report.

The facts of this case, so far as they are necessary for a proper understanding of the questions of law involved, are found in the Court's opinion.

WICKES, A. L. J. The error which we think pervades the report of the auditor, is in the application of a wrong principle of law to the facts found by him.

An administrator paid money belonging to a minor child of the decedent, with her knowledge and consent, to another person not her guardian. After the minor became of age, she took no action in regard to this money for a period of nearly two years, except to write a letter to the person who received it, in which she said "she wanted her money." In the meantime the administrator filed his account and it was confirmed, without exceptions being filed to it. In the account the administrator takes credit for the sum of money so paid during her minority, and his liability to account to her for it is the question before us.

It is not suggested that her consent to the payment at the time it was made, renders it valid as against her, but the auditor holds as a sound principle of law "that the knowledge obtained by the minor, immediately before she became of age, (if not after that time) as well as all she knew from being present when the money was paid, did bind her with such knowledge as she was bound to act upon after coming of age." In other words, both the auditor and the counsel who argued the case in support of the report, apply a principle of law which is entirely correct between persons *sui juris*, as principal and agent, but quite overlook the fact that a very different principle applies where one of the parties is a minor at the time the transaction takes place.

A principal who neglects to disown an act of his agent, who has transcended his authority, makes the act his own; Bredin *v.* DuBarry, 14 S. & R. 27; Wright *v.* Burbank, 14 P. F. Smith 247, &c.

This is the principle relied upon by both auditor and counsel as controlling this case, and it is sound and well settled law, but it does not apply to the contracts of minors or married women.

In the first place, there is not a particle of evidence that, to the administrator himself, she ever said one word which could operate to discharge him from his liability, after she became of age, for it is very manifest, from the evidence, that the receipt she gave him, "at or about the time she became of age," as the auditor expresses it, was really given before the 20th April, 1875, the day she attained her majority, nor is it important, unless she was shown to have known her rights; Wills' Appeal, 10 Harris 332; or had received a full equivalent. We do not therefore perceive the importance of the testimony as to what occurred between herself and the person who received this money, after the minor was of age, for it could not affect her rights as against the administrator himself. Said the Supreme Court, "a promise to take a case out of the statute of limitations, or to affirm an infant's contract, must be made to the party in interest or to his agent." Gillingham *v.* Gillingham, 5 Harris 302; Chandler *v.* Glover's administrator, 8 Casey 510; 3 Wend, 479. This is not a contract, it is true, but certainly it can stand upon no

higher ground, and there is not one syllable in the case, which shows that anything at all occurred between the administrator and the minor, after she was twenty-one, which could by any possiblity of construction relieve him from his liability to her.

Nor did she ever in her conversation with other people approve *in totidem verbis,* the act of the administrator in paying over this money, nor is there any thing from which such approval can be inferred. Her effort to get this money from the person to whom it was paid amounted to nothing. He was no agent of her's to receive it, she had no right to appoint an agent or attorney at the time it was paid; so that the only escape for this administrator is upon the ground the auditor and counsel have sought to place it, and that is her failure to disavow this act of the administrator during a period of nearly two years after she became *sui juris.* There is a mere dictum of Dallas, J., in Holmes *v.* Blogg, 8 Taunton 39, that in every instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in a reasonable time, or he will be bound; but the current of decision in this country will not warrant the abstract proposition, that a bare neglect to disaffirm, is itself a ratification. Silence for an unreasonable time, taken in connection with other facts, such as using the property purchased, retaining possession of it, selling or mortgaging it, or in any way converting it to the infant purchaser's own use, would undoubtedly be a sufficient ratification, and the cases are clear upon this point; Lawson *v.* Lovegay, 8 Greenleaf R. 405; Boyden *v.* Boyden, 9 Metcalf 519.

But the true rule on this subject seems to have been laid down in Hall *v.* Gerrish, 8 New Hamp. 374, that the acts relied upon to constitute a ratification must be of a character to constitute as perfect evidence of a ratification as would an express and unequivocal promise to pay. In that case the infant not only did not disaffirm, after arriving at full age, but when called upon to pay said he owed the debt and that the plaintiff would get his pay; this was considered no ratification. In Ford *v.* Phillips, 1 Pick. 202, the infant not only did not give any notice of a disaffirmance, but said, after his majority. that he owed the plaintiff and would try to get his brother to be bound for it; the contract was held not to be ratified.

In 3 Wend. 479, an infant purchased a horse, during minority and gave his note; he never gave any notice of an intention to disaffirm. Held, he was not bound.

In Thompson *v.* Lay, 4 Pick. 47, Parker C. J. said, "The promise of an infant cannot be revived, so as to sustain an action, unless there be an express confirmation or ratification, after he comes of age. Such a ratification may be proven in divers ways, but it cannot be inferred from a mere acknowledgment of the debt, as in the case of the statute of limitations. A promise to pay is evidence of a ratification; so is a distinct confirmation, though not in words amounting to a direct promise; as if the party should say, after coming of age,—*I do ratify and confirm—or do agree to pay the debt.*"

But our own cases are also clear and full to the point, that there must be some distinct act, by which the infant receives a benefit from the contract, after he arrives at full age, or does some act of express ratification; 11 S. & R. 311.

In Hinely *v.* Margaritz, 3 Barr 428, it was held that part payment of a debt contracted during infancy will not be a ratification, and this would seem to show conclusively, that *a fortiori,* a bare *non* disaffirmance would not have any such effect.

In Urban *v.* Grimes, 2 Grant 96, the Supreme Court held, that a forbearance by a person, for fourteen years, to bring an action to disaffirm a sale of land made during minority, is not an affirmance of the title, "one authority affirms the proposition," says the court, "but the author-

ities the other way are overwhelming." —See also Lenhart *v.* Ream, 24 P. F. Smith 59.

Again in Curtin *v.* Patton, 11 S. & R. 305, it is held, "that to make a contract entered into by an infant, as surety, binding upon him when of age, it must appear that after his arrival at full age, he ratified the contract by some distinct act, with full knowledge that it would otherwise be void." We think these authorities abundantly sustain the position, that a mere failure to disaffirm cannot amount to a ratification or confirmation of the act done during minority, no matter what the infant's knowledge of the facts may be.

Nor does the doctrine of equitable estoppel apply; Keen *v.* Coleman, 3 Wright 299. The doctrine of all these cases, is based, not upon the *privilege* of the infant but upon his *"legal incapacity* to contract," or to consent to any disposition of his property, unless for necessaries; and he is no more bound, upon arriving at age to disaffirm a contract, or disavow the consent he gave during minority, to the loan of his money, both acts which divest him of his property over which he had no control, than if the contract had never been made, or the money had never been loaned.

If the administrator had taken a security for the money, and the minor had chosen to accept it after arriving at age and being fully informed of her rights, it would present a very different case. But the proof of her acceptance, with an intelligent apprehension of her legal rights, would have to be explicit and clear.—Nothing can be left to inference, in the case of a servant girl, ignorant of her rights and her wrongs, who settles with her guardian or the administrator of her father's estate, as in this instance.

There was evidently a misconception on the part of the administrator, of the character in which the person to whom he paid this money was acting; but he was bound to know to whom he was giving it. It was his own carelessness and folly to part with it to one wholly unauthorized to receive it.

But with all this we have nothing to do, and we can only say, with Chief Justice Tilghman, in Stoolfoos *v.* Jenkins, 12 S. & R. 404, that "whether it is honorable in her and her husband to sue for the land, after her having received the value of it in money, is another matter with which this court has nothing to do. But I am clearly of opinion, that there was nothing in the evidence offered by the defendant, which should make the plaintiff's case an exception to the general rule, that an infant can make no contract by which he can be divested of his estate."

But it is insisted the petition presented to the Court was insufficient to warrant the appoinment of an Auditor, to inquire into this administration account. Certainly a petition of review, as provided by the act of 13 Oct., 1840, would have been the regular and proper method of obtaining relief. But the matter has been fully investigated, the parties in interest have appeared, made their proof and been heard upon the merits of the question involved, and it cannot be said that any interest or right has suffered because of this informal proceeding. It would, therefore, we think, be a hardship to set aside this report and vacate the appointment of the auditor, for reasons rather of form than of substance, under the circumstances of this case.

The administrator's account is very inartificially drawn. It repeats a common error of combining administration and distribution in the same account. Of course it settles nothing but the basis upon which distribution may hereafter be made, and no one was bound to come in, examine it and file exceptions to it, because the administrator chose to include payments in it which he saw proper to make to the distributees; they had no proper place in it.

It was nevertheless confirmed absolutely, which was of course a final decree and the proper way to attack it was by a

bill of review. But for the reasons given we will not compel these parties to go over the same ground again, which would involve a double expense and result in no good. There can be no question that the $160 claimed by this distributee is included in the item of $293, in the account, credited as paid to Isabella Illias; such is the testimony of the accountant. Under the views expressed in this opinion, it is not a proper credit, and the administrator must be surcharged with it.

And now to wit, it is ordered, adjudged, and decreed that William Haynes, administrator of the estate of Michael Illias, dec'd., be surcharged with the sum of one hundred and sixty dollars, with interest from the 16th day of April, 1874. And that the said William Haynes, pay unto Isabella Ness, formerly Isabella Illias, the said sum of one hundred and sixty dollars with interest as aforesaid, due and owing to her as an heir at law of Michael Illias, dec'd., and further that the said administrator pay the costs of audit.

[See, on this question of the ratification of an infant's contract, Kimmel *v.* Haas & Grove, 1 YORK LEGAL RECORD 65, and Murr *v.* Berkheimer, *id.* 177.]

QUARTER SESSIONS.

Q. S. of Luzerne Co.

Road in Nescopeck Township.

Road law—Defective oath.

Where, in a road case, it appears from the face of the record, that the viewers were "duly sworn," and no one of the exceptions filed refers to a defect in the form of the oath, it will be presumed that the oath was in the form required by the statute.

WOODWARD, J. The act of 13th June, 1836, prescribes the form of the oath to be taken by viewers before proceeding in the performance of their duties. The third section of the act prescribes that the viewers shall make report at the next term of court, and shall state particularly in their report, among other things, "whether they were severally sworn or affirmed."

In the present case the report of the viewers states that they were all "duly sworn." When the exceptions were filed, no one of them referred to any defect in the form of the oath actually taken. Under the authority of the Road in Moore Township, 5 H. 116, and the case of the Lower Merion Road, 6 H. 240, we feel bound to hold that it is now too late to allege a defect in the form of the oath as ground for setting aside the report. We do not think the cases referred to by the learned counsel for the exceptions apply to the case in hand. The form of the oath stated in the order is irregular, but it still remains true that upon the face of the record the viewers were "duly sworn."

The motion to set aside proceedings because of defective oath is denied.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Ejectment — Interest.—An action of ejectment may be sustained for non-payment of interest due annually under articles of agreement of sale and purchase of real estate.—*Moyer v. Garrett et al.*, 38 Legal Intelligencer 104.

Husband and wife — Desertion. — A husband who has deserted his wife and family, and neglected to provide for their support, cannot receipt for and satisfy a judgment recovered for the use of the wife.—*Moore et ux. v. Whitaker,* (Luzerne C. P.) 10 Luzerne Legal Register 78.

Will — Testamentary Capacity. — Where the testator is weak in mind, though not sufficient to create testamentary incapacity, and the person whose advice he has taken profits largely under the alleged will, affirmative evidence must be given to show that testator had a full understanding of the nature of the disposition contained in it.—*Culthbertson's Appeal,* 38 Legal Intelligencer 124.

YORK LEGAL RECORD.

VOL. II. THURSDAY, APRIL 14, 1881. No. 6.

COMMON PLEAS.

McMullen v. Stone and Wall.

Will—Construction of—Dying without issue.

The clause of a will read as follows: "I give and devise to my two sons Hugh McMullen and George McMullen the plantation that I now live on to be equally divided between them, to them their heirs and assigns, for ever. Subject to the payment of thirty shillings yearly to my daughter Elizabeth during her natural life and one-third of the clear rent yearly to my dearly beloved wife during her natural life. It is also my will that if either of my two sons, Hugh or George *should die without legitimate issue that the survivor shall inherit the whole of the deceased's part of the land aforesaid* * * * * * It is further my will that my said two sons shall neither rent, bargain nor sell the land aforesaid, nor enter into agreements, indentures, or bargains of importance before they arrive to the age of twenty-one years but by the approbation and consent of my executors." HELD, to create an estate tail in each of his two sons, with cross-remainders in fee.

In an action of ejectment brought by a grand-son of George, to recover part of the land devised to Hugh and George, and sold by a daughter of Hugh to the defendants, HELD, that Hugh's issue having become extinct, the land vested in the issue of George, and the plaintiff was entitled to recover.

The word "survivor," in a devise of real estate, does not, by force of any settled legal construction, import a definite failure of issue, or confirm the limitation over to a person *in esse* at the death of the testator.

If this construction of the will is correct, the result is not affected by the fact that Hugh left issue to survive him, which issue subsequently became extinct, nor that George died during the lifetime of Hugh's issue, for if the limitation over operates as a vested remainder in fee, it would on the failure of Hugh's issue, pass to George, if living, not as a life estate or in tail, but in fee-simple, and if dead, would descend to his heirs.

Case stated.

The only questions of law involved in this case are given in the Court's opinion.

W. C. Chapman, for plaintiff.

V. K. Keesey and Robert L. Muench, for defendants.

April 11, 1881, WICKES, A. L. J. The controversy in this case turns upon the construction of the will of Hugh McMullen, the elder, dated the 29th of November, 1792, and admitted to probate in March, 1793.

The language of the will (so far as concerns this case) is, "I give and devise to my two sons Hugh McMullen and George McMullen the plantation that I now live on to be equally divided between them, to them, their heirs and assigns for ever. Subject to the payment of thirty shillings yearly to my daughter Elizabeth during her natural life and one-third of the clear rent yearly to my dearly beloved wife, during her natural life. It is also my will that if either of my two sons, Hugh or George *should die without legitimate issue that the survivor shall inherit the whole of deceased's part of the land aforesaid* * * * * * It is further my will that my said two sons shall neither rent, bargain nor sell the land aforesaid, nor enter into agreements, indentures, or bargains of importance before they arrive to the age of twenty-one years but by the approbation and consent of my executors."

When Hugh McMullen died in 1793 he left to survive him six children of whom Hugh and George were the youngest, being twelve and sixteen years of age respectively. They took possession of the land devised to them by their father, and early in the present century divided it into two parts, each taking one.

Hugh died leaving two daughters, Elizabeth and Mary Ann, to whom he bequeathed and devised his property.

Mary Ann died intestate and without issue in 1879. Elizabeth married David Newcomer and survived him.

In February, 1879, she conveyed part of the land in dispute to Thomas Stone, one of the defendants, and by deed of equal date, another part of the said land to Jacob Wall, the other defendant. Elizabeth died October 29th, 1879, without issue.

George McMullen, son of the testator, died Dec. 10th, 1850, leaving five children, all of whom have since died, leaving children to survive them, one of whom is the plaintiff in this case.

George sold and conveyed during his lifetime, his part of the real estate devised to him by his father, and it is sought to recover in this action not only that portion of the land devised to Hugh but that also which George sold during his life, and which by various conveyances has also passed into the possession of these defendants.

But it is the admitted fact of the case that the purchasers from George and those who hold under them, have been in continued and adverse possession of this part of the land since its conveyance in 1819, and as the right of action accrued on the death of George in 1850, it was conceded by the plaintiff's counsel that no recovery can be had, because of the bar of the statute, of so much of the land as George took under his father's will.

We therefore dismiss this branch of the case.

The important question before us, grows out of the construction we are asked to give the clause of the will devising to Hugh and George the real estate in controversy; for it is not pretended that any other obstacle is presented to a recovery by the plaintiff, of so much of the land as was devised to Hugh, except to determine the character of the estate taken by him under his father's will. Without attempting to wade through the great multitude of authorities relating to this subject, but relying confidently upon the correctness of the principles asserted in Eichelberger *v.* Barnitz, 9 Watts 447; and Langley *v.* Heald, 7 W. & S. 96, which Mr. Justice Bell said in Eby *v.* Eby, 5 Barr 463, "settle the law in Pennsylvania." we desire to advert as briefly as possible. to those and a few of the subsequent cases, for their name is legion, to ascertain the fundamental principles which underlie this inquiry and must determine the result. In Eichelberger *v.* Barnitz, the general rule was asserted to be, that the words "if he die without issue," or "on failure of issue" or "for want of issue," or "without leaving issue," then over, following a devise in fee, that the estate of the first taker is a fee tail, because the technical meaning of the words import an indefinite failure of issue, and that while the limitation over would be good as a remainder, it could not stand as an executory devise, because too remote.

But Langly *v.* Heald furnishes us an illustration of an exception to the general rule laid down in Eichelberger *v.* Barnitz, which is, that where there are expressions in the will clearly restricting the "dying without issue," &c., to a failure of issue at the time of the death of the first taker, or to some other time or event, which must occur, if at all, within the time allowed for the happening of a contingency on which an executory devise may be limited, there the first devisee takes an estate in fee simple, and the limitation over is void as a contingent remainder, but good by way of executory devise.

Such is also the doctrine of Williams *v.* Conrad, 1 Gr. 21, of Lapsley *v.* Lapsley. 9 Barr 130, of George *v.* Morgan, 4 Harris 107, and a multitude of other cases to which I need scarcely refer.

Indeed the difficulty does not seem to be with the abstract principle of law; but rather their application to this particular case. It is asserted in the first place that the testator meant a failure of issue either at his own death or at that of the first taker, and the word "survivor" is said to indicate that intention.

When we remember that the devisees were only twelve and sixteen years of age respectively, at the testator's death, it is difficult to conceive that such a thought could have entered his mind as a failure of issue at that time.

I did not however understand this view of the case to be seriously pressed.

But it was earnestly insisted that the death of the first taker was the period fixed by the testator when the failure of issue was to happen, if at all.

There is absolutely nothing on the face of the will to indicate such an intention except the limitation over to the survivor.

The case most relied upon, and which it was said nearly resembled the one at bar, was Anderson *v.* Jackson, 16 John. 379. There the devise was in fee to the two sons, and in a subsequent part of the will the testator directs that "if either of the said sons should depart this life without lawful issue, his share or part shall go to the survivor." And this was held

to create a defeasible fee in the first taker, with a limitation over by way of executory devise. But it is impossible to rise from a careful consideration of that case, without the conviction that it was decided in the face of the English authorities, and only because under the New York statute regulating descents a current of decision existed, commencing with Fosdick *v.* Cornell which could not be disturbed without unsettling the titles to real property. Chancellor Kent delivered a dissenting opinion, in which he reviews the cases at great length, commencing with the earliest reported case following the statute *de donis,* and he asserts as the sum and substance of his elaborate examination and reasoning, "that no point of law was ever more completely established, and better fortified by all that is venerable in authority on each side of the Atlantic," than that the words of the devise, mean an indefinite and not a definite failure of issue.

And he further says "that the contrary doctrine was mistakingly, and upon a very imperfect examination of the subject declared in the Supreme Court in Fosdick *v.* Cornell." So that the case is rather an authority against the position of the defendants.

In Caskey *v.* Brewer, 17 S. & R. 443, a case involving the same question, Mr. Justice Houston took occasion to say, after affirming the English rule as our own, "that New York seems to form, for the last twenty years, an exception."

The rule, that the subsequent limitation over to the survivor or survivors of a class of persons *in esse* when the will is made, takes effect as an executory devise and not as a remainder limited upon an indefinite failure of issue, has never prevailed in this state, except in bequests of personal property, where the courts lay hold on any word or circumstance in the will, however slight, that may seem to afford a ground for such a construction.

Our cases are full to the point, and they but echo the English authorities on this subject.

In Hope v. Taylor, 1 Burr. 268, there was a disposition of the whole of the testator's real and personal estate to several, with a limitation over to the survivors, if either should die without issue lawfully begotten, and it was adjudged to be an estate tail in the real property, and the limitation over of the personal estate, void. In Amelia Smith's Appeal, 11 Harris 9, there was also a devise of real and personal property to testator's children in equal shares, with a provision that in case of the death of any of them without issue, his or her share should be equally divided among the survivors, it was held to pass an estate tail in the land to the first takers, with vested remainders over in fee, and the absolute title to the personal property. And in Snyder's Appeal, 9 W. N. C. 213, the latest reported case on this subject, where the authorities are carefully collected and reviewed, the same distinction is taken and the same doctrine prevails.

These cases serve to illustrate the subtle distinctions taken in support of limitations of personal property, but they serve also to show, that the rule does not apply when the devise over is real estate.

Nor does there seem to be any reason, in the case of real prosperity, why the survivor should be living at the happening of the event on which the limitation over is made to depend. If the language of the will is such as to create an estate tail in the first taker and a remainder in fee to the survivor, the remainder would vest immediately on the death of the testator and pass on the failurer of issue, to the survivor in his own person, if alive, and if dead to his heirs, who would be capable of taking at whatever period of time the failure of issue might happen: Wilmont v. Wilmont, 8 Ves. 10; Davidson *v.* Dallas, 14 Ves. 576; Caskey *v.* Brewer, 17 S. & R. 441; Amelong *v.* Dorneyer, 16 S. & R. 325; Lapsley *v.* Lapsley, 9 Barr 130; Braden *v.* Cannot, 1 Grant 65; Haines *v.* Witmer, 2 Yeates 400; 5 Randolph's Reports, 273 & 308.

I have found but a single instance since Eichelberger *v.* Barnitz, in our own

reports, at variance with the principles declared and the cases cited to sustain them.

In Johnson v. Currin, 10 Barr 498, a decision which stands so severely alone in our reports, that it serves rather to warn us of the error it contains, than to furnish an authority we may safely follow, the court gave to the word "survivor" the effect which we are asked to give it here, but it has been doubted, until as we have said, it is no longer authority.

Criley v. Chamberlain, 6 Casey 165, Curran *v.* McMeen, 5 P. F. S. 490.

I am therefore of opinion that the word "survivor," in a devise of real estate, does not by force of any settled legal construction import a definite failure of issue, or confine the limitation over to a person *in esse* at the death of the testator.

But it is argued, there is a power of sale contained in this will, and that even admittting the technical words of the devise would otherwise create an estate tail, that such an estate would be wholly inconsistent with the power conferred.

The language is, "further it is my will that my said two sons shall neither rent bargain or sell the land aforesaid nor enter into agreements, indentures or bargains of importance before they arrive to the age of twenty-one years but by the approbation and consent of my executors."

It is to be observed that this direction of the testator deprived the two minors of no right, the law had not already deprived them of.

It would therefore seem to have been written in ignorance of the legal disabilities already imposed upon them.

The clause is not punctuated and it is not easy to say precisely what it means. —It is not however pretended that it confers an absolute power to sell, but it is said to give a conditional power.

It is certain the power was never exercised. It is well settled that although a particular power if executed might make a fee in the appointee, yet if not executed the estate limited in default of appointment is vested.

Said the late Judge Geo. W. Woodward in Barnet *v.* Deturk, 7 Wr. 95: "it may be, though this point is not considered, that if no attempt to exercise the authority had been made, * * * the provision would have been unimportant." And said Judge Strong in Physick's Appeal, 14 Wr. 136, "if no appointment was made, the will is to be read as if it contained no power of appointment."

In Dodson *v.* Ball, 10 P. F. S. 492, it was held that a power to appoint, if not exercised, will not operate to enlarge a life estate into a fee.

And again, it is said by Tilghman, C. J., in Clark v. Baker, 3 S. & R. 479, "this power (*viz.* a power to sell) is said by the defendants to be inconsistent with an estate tail. Not at all. It is collateral to the estate tail, but not inconsistent. The testator had a right to give an estate tail, subject to be defeated by this power."

I cannot however regard the will as giving, even by implication, a power to sell. It seems to have been a mere afterthought of the testator, by which he desired to prevent them from selling at all, or even renting without the approbation of his executors. If, as is contended, he intended to give a fee simple to his sons, certainly we are not at liberty to suppose that he further intended to impose restrictions upon the alienation of the property devised, for that he could not do. But if it was his intention, as the words of the devise clearly indicate, to create an estate tail in each of his sons, with cross remainders in fee, then a doubtful power, never exercised, ought not to be permitted to defeat the clear purpose of the testator.

We have not commented upon the words "die without legitimate issue" as no question was suggested as to their effect, if standing alone; 24 P. F. Smith 418; 6 Norris 362; 7 Norris 127.

We have considered the will from the standpoint of its own phraseology, and not in the light of subsequent events.—

Not only do we think the technical words of the will are to be taken in their technical sense, but we know of no other sense in which they could so well execute, what we conceive to have been the intention of the testator. If the testator had been asked "suppose your son Hugh should die leaving issue and that issue should die in one month afterwards, how in that case, do you intend his part of your estate shall go under your will?" Would not the probable answer have been, why to my surviving son surely. And suppose the further question addressed to him, but if your son George should have departed this life before the failure of Hugh's issue, leaving however children or grandchildren to survive him, can it be doubted, that he would have declared, "then to such posterity."

And yet that intention would be entirely defeated by the construction contended for, and George never could have taken at all, even had Hugh's issue survived him but a single hour.

If we are correct in our interpretation of the meaning of this will, it can make no difference, that Hugh McMullen died leaving issue to survive him, which issue subsequently became extinct, for an indefinite failure of issue would embrace that event.

Nor could it affect the limitation over, which would be good as a remainder, although void as an executory devise. Nor can the death of George McMullen during the lifetime of the issue of Hugh, affect the result. For if the limitation over operates as a vested remainder in fee, it would on the failure of Hugh's issue pass to George, if living, not as a life estate or in tail, but in fee simple, and if dead, would descend to his heirs; Lapsley *v.* Lapsley, 9 Barr 130; Braden *v.* Cannon, 1 Grant 65; Heffner *v.* Knepper, 2 Watts 21.

Whatever hardship may result to these defendants, by reason of the construction we have placed upon this will, is of course to be regretted.

We can only say however as did Mr. Justice Shippen in Haines *v.* Witmer, 2 Yeates 406; that "considerations of this kind must not induce us to unsettle established rules of law, lest we set all titles to real property afloat."

Without however pursuing this subject further, for the reasons given, we enter judgment for the plaintiff under the third judgment clause of the case stated, for the undivided one-tenth part of the land which Hugh McMullen took under the will of his father, and died seized of, with costs of suit.

Common Pleas of Schuylkill County.

Jacoby's Case.

Defaulting Assignee—Discharged as an insolvent.

A party imprisoned for contempt of court in disobeying its order to pay over moneys which came into his hands as assignee for the benefit of creditors, is not entitled to his discharge as an insolvent debtor on filing his petition and offering to give bond under the insolvent laws.

PERSHING, P. J. On the 15th of November, 1880, James F. Jacoby presented his petition to the court, setting forth that he was in custody by virtue of an attachment for a contempt, issued on the 18th day of May, 1880, at the instance of several distributees of the assigned estate of G. G. Jacoby & Co., of which the said James F. Jacoby was the assignee. His prayer was that he might be permitted, in order to procure his discharge to give bond to the several distributees of the assigned estate of G. G. Jacoby & Co. * * * in such amount and with such security as might be approved by the court, agreeably to the provisions of the insolvent laws of the commonwealth. The bond accompanying the petition contained the usual condition that the petitioner would appear at the next term of court, and there present his petition for the benefit of the insolvent laws, and if he failed to obtain his discharge, that he should surrender himself to the jail of the county, &c. On the filing of the petition the court granted a rule to show cause why its prayer should not be granted. The discharge of the petitioner is resisted by

the creditors for whose benefit James F. Jacoby was made assignee.

This application is in all respects similar to that in Rosenbach's case, reported in 34 Leg. Int. 305. Rosenbach, who was the guardian of several minors, was ordered by the court to pay over the moneys belonging to them to his successor in the successor in the guardianship. On his failing to comply an attachment was issued for contempt, and he went to prison. Rosenbach then petitioned to be discharged from confinement upon his giving a bond with sufficient security, conditioned for his taking the benefit of the insolvent laws at the next term of court. A rule granted by the court to show cause was made returnable Oct. 30, 1875, and discharged Sept. 26, 1876, on the ground that the insolvent laws afforded no relief for an insolvent debtor in such a case. On appeal the supreme court affirmed the proceedings in a *per curiam* opinion as follows: "There is no case upon this record to raise the question argued before us. The application to give bond merely is not an application for a discharge from liability to imprisonment under the insolvent laws. It is but a provision for a temporary discharged while the proceedings are in progress"

In *ex parte* Blumer, 5 Norris 371, relied on by counsel who resist the present application, there was a formal petition for discharge under the insolvent laws, with statements of indebtedness, &c., as is required by Sec. 9 of the Act of 16 June, 1836 (Pur. Dig. 778, pl. 17). Until James F. Jacoby sees proper to present a similar petition it is unnecessary to inquire how far Blumer's case will control in the disposition to be made of it by the court. His position before us does not entitle him to any relief beyond what he has a right to demand under the letter of the law. Rule for his discharge on filing a bond discharged.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Act of June 11, 1879—*Constitutionality of.*—Act of June 11, 1879, P. L., 129, is unconstitutional and void, because it proposes on its face to force a debtor to forego his constitutional right under Art. 1, Sec. 9, of the Constitution, of not being compelled to give evidence against himself, with which the Legislature has no power to interfere.—*Horstmann's Appeal,* 11 Pittsburg Legal Journal, 307.

County — Liability of. — The General Assembly cannot compel a county to pay a liability which had no previous existence, but they may pass an act which merely provides a remedy for the enforcement of a pre-existing liability. While the acts, authorizing counties of this Commonwealth to raise money to pay bounties to soldiers, gave authority to issue bonds, the creation of an indebtedness in any other form was equally within the spirit and the letter of the acts.—*Supervisors of Sadsbury Township v. Dennis et al.,* 11 Pittsburg Legal Journal 311.

Justice of the Peace—Transcript.—Lien of.—A judgment in the Court of Common Pleas on the transcript of a Justice of the Peace is in force for the purposes of execution for five years from the date of filing the transcript in the Common Pleas. It matters not that more than five years has elapsed since the judgment was rendered by the Justice.—*Rice v. Kitzelman et ux,* (Chester C. P.) 1 Chester Co. Reports 173.

Justice of the Peace—Judgment of.—While the judgment of a Justice of the Peace stands unreversed, the Court of Common Pleas, in which a transcript has been filed, can not, on motion, strike off a judgment against one of the defendants.—*Rice v. Kitzelman et ux.,* (Chester C. P.) 1 Chester Co. Reports 173.

YORK LEGAL RECORD.

Vol. II. THURSDAY, APRIL 28, 1881. No. 7-8.

COMMON PLEAS.

Ness v. Ness.

Will—Execution of—Subscribing witnesses.

The two witnesses to a will need not be *subscribing* witnesses—that is they need not sign their name, as witnesses to the instrument itself—but each witness must prove all the facts necessary to constitute the due and formal execution of the paper.

The testimony of a witness who swears to the execution and identity of a will, is not to be rejected as incompetent and insufficient in law, because he is unable to designate any peculiarity in the testator's mark or signature, or in the paper upon which the will is written.

The following is the charge of WICKES, A. L. J., to the jury in this case:

Gentlemen of the Jury:

At half past ten o'clock last night, when the evidence closed in this protracted case, a formal request was presented and filed in this court, by defendant's counsel, asking us to reduce to writing our charge, and read it to the jury. In the interval, since then, we have endeavored to comply with this request, sufficiently at least to aid you in the determination of the questions of fact involved, although we are entirely conscious, that the result of our effort, is far less satisfactory to you and certainly to us, than if the more usual course of practice had been pursued, and the request to reduce your charge to writing been preferred *after* its delivery, instead of in advance.

This is a feigned issue framed to test the validity of the will of Mary Ness.

The questions which arise in a case of this character, are such as to challenge our most serious and careful consideration. We are dealing with an instrument which contains the only record which survives of the wishes of one who can no longer speak for herself—and courts and juries should always regard such an instrument as a very sacred thing, and pause long before they lay hands upon and destroy it.

But before such a paper comes to us robed in the sanctity which attaches to a *will,* its execution must be duly and legally proven, and if this is not done, whatever may be its weight with those in whose hearts survive feelings of tenderness and love for the one who has passed away, it is destitute of that element of power to compel obedience, which the law only confers upon instruments executed in the formal manner which it prescribes.

The question which confronts us at the very threshold of this case is, was this alleged will executed as required by law, and is such execution so fully proven, *prima facia* at least, as to entitle it to your recognition, apart from the other questions, to which I will hereafter allude.

The act appproved the 11th day of April, 1848, (second Section), provides that "any married woman may dispose of her separate property, real, personal and mixed whether the same accrue to her before or during coverture: *Provided*—That the said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband." The act then provides that a married woman's will shall be executed in the presence of two witnesses, nether of whom shall be her husband.

It is decided law that these two witnesses need not be *subscribing* witnesses—that is they need not sign their name, as witnesses to the instrument itself—but each witness must prove all the facts necessary to constitute the due and formal execution of the paper. In the case before us, it is not pretended that the husband was even present when the paper was signed, so that he was not in any sense a witness to its execution, and of course no difficulty arises from any provision of the Statute on that score. The two persons who have sworn they were present, are Dr. Henry Wolf and Mrs. Eve Ness, one of whom was attending as a physician at the time, and the other on a visit to the house of the testatrix.

Dr. Wolf's testimony is that he was

present as was also Eve Ness, when Mary Ness signed these papers, and said they were her last will, and his testimony seems to be clear and explicit, and if you believe what he says, comes up to the full measure of proof required in such a case, and I do not understand that its *prima facie* sufficiency is seriously questioned. I need not therefore pause to examine it; but he constitutes only *one* witness, and before this paper can be pronounced a will, it must be shown by another witness that it was properly executed by the decedent.

The second witness produced for that purpose, is Mrs. Eve Ness, and she testifies that she was present with Dr. Wolf in the chamber of Mary Ness, when these papers were signed—"that she was standing near by at the time and saw Mary Ness sign them and heard her say at the time, that it was her last will that she signed."

If this was all the testimony, there would be no difficulty in at once declaring the will duly proved, but in the light of the testimony subsequently produced, a question of fact is presented to you, whether Eve Ness has sufficiently established the execution and identity of these papers. If she has not there is an end of this case—if she has, then the requirements of the statute have been complied with, and if this will is overthrown it must be on some other ground, than defective execution or the legal sufficiency of the proof of execution. You will remember that in cross examination Mrs. Eve Ness admitted she could neither read nor write, that she could not tell one written letter from another, so that of course she could not identify these papers by the handwriting, nor is it necessary she should so identify them—she said the papers signed by Mrs. Mary Ness "were such as these and I believe these are the papers—from their general appearance I think these are the same papers." She further says—"I saw her write on two papers—she didn't write them both out and out as they are: one was written and part of the other"—this agrees substantially with what Dr. Wolf says in regard to the transaction, and it is entirely proper that you should consider his testimony in the case, in corroboration of hers, so far as it relates to these circumstances, occurring at the time. The Supreme Court, in Carson's Appeal, 9 P. F. Smith 499, have recently laid down a rule in regard to this question of the identity of a will in a similar case to this, and it applies here with equal force. Said Mr. Justice Williams, in speaking of the testimony of a witness to a will, who could neither read or write and who had no special mark in the instrument by which to identify it:

"Is his whole testimony to be set aside and pronounced insufficient in law to establish the will because he could not point out anything peculiar or characteristic in the mark which the testator made, or anything in the paper upon which it was written to distinguish it from other paper of the same kind? The testimony of a witness who swears to the execution and identity of a will, is not to be rejected as incompetent and insufficient in law, because he is unable to designate any peculiarity in the testator's mark or signature, or in the paper upon which the will is written. There may be nothing peculiar in the mark or paper, and yet the witness, from the general appearance of the instrument, and its likeness in all respects to the one he saw executed, may have no doubt as to its identity, and be able to swear that it is the same paper.

"It is true that his testimony may be disbelieved, if he is not trustworthy, or if the facts and circumstances of the case, show that he is mistaken, but his testimony cannot be set aside as legally incompetent or insufficient to establish the identity of the will. The *legal insufficiency* of the testimony must not be confounded with its credibility—the one involves a question of law, the other a question of fact."

And so we say to you in this case, if you believe the testimony of Eve Ness,

that she saw Mary Ness sign these papers, and declare at the time, they were her last will, and that these are the identical papers, as she says they are, then it is legally sufficient as the evidence of one witness to the will, and with Dr. Wolf's testimony as the other, if believed by you, would come up to the standard of proof required by the statute, and entitle this paper to recognition as the last will and testament of Mary Ness. But gentlemen —the *credibility of* Eve Ness is a question for you to determine, and if you arrive at the conclusion, after considering the evidence, that she is not entitled to belief, that she never saw Mary Ness sign these papers, that she is not entitled to belief, when she swears to their identity as the very papers signed by Mary Ness, then however sufficient her evidence may be in law, if believed, if disbelieved it is entitled to no weight, and it would be your duty to find for the defendant, for then these papers would be left with only one witness to their execution.

In considering this question, it will be proper to recall the contradictions of her testimony. She was asked on cross-examination if she said, in this Court House and in Mr. Fisher's office last December when shown these papers in the presence of Sam'l Wallick, Overmiller, Burns and others that she could not identify them; you will remember the testimony and I need not read it and she denied having made such declarations.

Now in all these matters Mrs. Eve Ness stands contradicted—no less than four or five witnesses testify that she did make the very declarations she said on cross-examination she did not make. Not only does this contradiction affect generally her credibility, but it will be a pertinent and proper inquiry for you to make, whether having failed to identify these papers in the Court House and in Mr. Fisher's office, she is to be trusted in her identification of them now. She says she had never seen them during the interval of time between the signing and the exhibition of them at Mr. Fisher's office, but that she has seen them and examined them this week at Mr. Chapman's office, and can now fully identify them.

I cannot recapitulate all the facts bearing upon this important question, counsel having argued them at length, and it will be your duty to carefully weigh them, before reaching a conclusion. Upon you the law distinctly casts the burden of ascertaining from the evidence whether Eve Ness is to be credited when she swears she saw Mary Ness sign these papers and declare them her last will. If she is, and you credit Dr. Wolf, it sufficiently establishes *prima facie* the execution of the will; if she is not to be credited, and after considering this evidence you arrive at the conclusion that she is not to be believed, then this paper is not entitled to be received as the last will and testament of Mary Ness, and must be overthrown.

But, gentlemen, all this is predicated upon the testimony as it stood prior to the introduction of evidence tending to show that the name of Mary Ness signed to these papers, was not written by herself, but that, in other words, not only are the signatures, but that the entire instrument is a forgery.

This of course goes to the very essence of this inquiry. These papers are only entitled to our respect as the will of Mary Ness, upon the hypothesis that she in her proper person executed them. If they are the work of some other hand, no matter whose, they are the mere spawn of a base fraud, and as such utterly unworthy of recognition.

This is a question, and a serious question for you to determine; and it behooves you to examine carefully and earnestly the testimony, before you decide it.

You have in the first place the positive assertions of Dr. Wolf, that he *saw* Mary Ness write her name to these papers; this if believed is the highest and best kind of evidence known to the law and Dr. Wolf stands unimpeached in this case. You

have also the evidence of Mrs. Ness, that although she cannot read or write, that she saw, at the same time testified to by Dr. Wolf, Mary Ness write something on these papers, and that she said when she did so, that she was signing her last will; these are the only two persons whom it is pretended were present at the actual signing.

Do they tell the truth? Are they to be credited? That is the question, and it is for you to determine.

You have had produced before you several of her signatures, proved to be genuine; made prior and subsequent to the alleged execution of the will. You have heard the opinions of witnesses on the stand, that these papers Nos. 1 and 2, are not in whole or in part, in the hand writing of Mary Ness; you have heard them examined as to their means of knowledge of her hand writing, and you will remember all this, and consider all this, in determining this matter; you will of course compare the hand writing of Mary Ness proved to be genuine by witnesses who saw her write, with the signatures and dates of the will, which Dr. Wolf and Eve Ness, swear they saw her write, and you will say, from all the evidence, whether in your opinion, the signatures to the will were written by the hand of Mary Ness or not.

You have also heard the testimony of two witnesses called experts, who have compared these signatures, and declare as their opinion, that the signatures to the receipts, and the signatures to the alleged will were not written by the same person; and you have heard them further declare that the hand writing in one and two as they are called, were similar in character and style to the hand writing in the grain receipts and letters, admitted by William Ness to have been written by himself. But you will also consider the means and opportunities of knowledge these witnesses have had who testify to hand writing from having seen the parties write. Noah Ness and Jonas Trimmer had each seen Mary Ness sign her name to certain receipts which were produced and are before you; and he further had seen her sign a receipt and write about home before her first marriage and that was all; and from that they say they do not believe the signatures to these papers one and two, are in her hand.

On the contrary, Ella Godfrey has testified that she often saw Mary Ness write, that she often brought her letters she had written, to be looked over, and that she knew and had opportunities of knowing her hand writing; and she swears that these signatures and the body of these papers are in Mary Ness's hand writing. This is addition to the higher or more positive proof made by Dr. Wolf and Eve Ness, that they saw Mary Ness sign this will. William Ness, the plaintiff in this issue, was also examined and he swears he did not write these papers but that they are in the hand writing of his wife, as he believes, although he said the writing looked a little heavier than hers, but that she never wrote twice alike. This evidence of William Ness, of course gentlemen, cannot be considered by you as an element of proof to make out *prima facie* the execution of this will, and we admitted it for no such purpose, nor was it offered for any such purpose; but it is proper to be considered by you, in rebuttal of the alleged fraud, and for that we permitted it to go to you. William Ness is contradicted by two witnesses as to certain declarations he made concerning these matters; you will take all these facts, and many others which I cannot now recall, into consideration, and say from them whether fraud and forgery have been committed here, or whether these papers were signed, as sworn to by Dr. Wolf and Mrs. Ness, by Mary Ness, and as such constitute her last will and testament.

It is necessary, gentlemen, that a married woman in order to make a will at all, be twenty-one years old; and this fact it is for you to find from the evidence in the case; no formal proof was made of it by

the plaintiff, but it is in evidence that she had children nearly grown up at the time this alleged will was signed, and her father stated in his testimony, that she was born about 1835. From these facts, you cannot very well doubt that she was twenty-one years old at the time these papers were signed; but it is a necessary fact in the case for you to find from the evidence.

It is said there are two papers here, and if their execution is established, that the result is two distinct wills, repugnant one to the other, and without evidence to show which was executed last in point of time.

But, gentlemen, we instruct you that the law is that if you believe the testimony of Dr. Wolf and Mrs. Eve Ness, that then in law these papers constitute only one will, and although on separate pieces of paper, were executed at the same time, signed and dated on the same day, witnessed on the same day, and together constitute a complete testamentary disposition, which can stand and be construed together. We discover nothing so fatally repugnant in their clauses, that one part must destroy the other; the rule of law requires that both shall stand if they can be construed together, and we discover no reason why they cannot be. Both, it is true, are signed; but as the Supreme Court has said in Evans' Appeal, 8 P. F. Smith 245, "it is not uncommon for a testator to sign his name repeatedly to a testamentary paper. He sometimes signs each sheet, sometimes at the close of every disposition, and again at the end. It is the last which consummates the instrument and makes it a will.'"

And our own observations fully accord with this statement of the habit and practice of testators, especially those who are not skilled in the preparation and execution of such instruments.

And, now, gentlemen, I can only conclude as I commenced by admonishing you of the serious nature of this issue. The Supreme Court has lately said there is a growing disposition on the parts of Courts and juries to set aside last wills and testaments which ought not to be encouraged. This only means in its application to this case that a paper so sacred, and speaking as it does the wishes of the dead, ought not to be lightly set aside.

If in the light of all the evidence you believe Mary Ness executed this will, and was twenty-one years old at the time she did so, it will be your duty to find a verdict for the plaintiff.

If on the contrary, you believe it is not her will, but that it is the mere birth of fraud or forgery, then it will be your duty to find for the defendant.

ORPHANS' COURT.

Leitner's Estate.

Guardian—Rights of.

The rights of a guardian over the estate of his ward cease upon the death of the latter.

Appeal from the decree of the Register of Wills, granting letters of administration to W. H. Kain, Esq.

V. K. Keesey, for appellant.

John Gibson, for appellee.

April 25, 1881. FISHER, P. J. The intestate in this case, George E. Leitner, at the time of his death was a minor of the age of about three years and had for his guardian at the time of his decease Emanuel C. Herman.

Under the supposition that the power of the guardian ceased at the time of the ward's death these letters were granted.

The minor had at the time of his death an interest in certain real estate which was leased for a term of years, the rents, issues and profits thereof were unsettled. It also appears that his estate was indebted to his late guardian—and that "his board and maintenance from September 8th, 1876, to July 12th, 1878, amounted to $237.56, and was claimed by Mrs. Sarah A. Baker.

As we think the power of the guardian over the estate ceased at the time of the minor's death and that therefore an ad-

ministration is necessary we have concluded to dismiss this appeal; *vide In re* John N. Bush's estate, 8 Philadelphia Report, pages 190 to 195.

And now to wit, April 25th, 1881, appeal dismissed. We also decree that the appellant Albert C. Leitner pay the costs of this appeal.

SUPREME COURT.

Barr v. King et al.

Foreign corporation—Service on.

A foreign corporation qualified to do business in this state by having complied with the statutory requisites, may be made a garnishee in an execution attachment.

Error to the Court of Common Pleas of Mercer County.

Charles Miller, in his lifetime, resided in Erie city, Pa. He had two sons, James S. Miller and W. H. Miller. Charles Miller became a member of the State Mutual Aid Association of Columbus, Ohio. His certificate of membership provided that at his death, his said two sons should receive from that association the sum of three thousand dollars. He died at Erie, Pa., July 14, 1879, while a member of the association, leaving surviving, the said two sons.

M. R. Barr, to use of Jacob Best, plaintiff in error, obtained a judgment against Wilson King and the son, W. H. Miller, who survived Charles Miller, in the Court of Common Pleas of Erie county, Pa., for the sum of nine hundred and fifty-three dollars and forty-five cents, which judgment was entered on the 19th day of September, 1879, on a note dated the 10th day of January, 1877.

An exemplification of the judgment and record was taken, and entered in the Court of Common Pleas of Mercer county, on the 26th day of November, 1879, and on the same day an execution attachment was issued and on the 29th day of November, 1879, served on W. B. Henry and Henry Hoomer, agents of the State Mutual Aid Association, before mentioned, the said association being made the garnishee.

The object of the attachment was to attach the money due from the acsociation to W. H. Miller on the certificate of membership of Charles Miller, deceased.

In motion, the Court of Common Pleas of Mercer county set aside the service of the writ of attachment, on the ground that foreign corporations could not be reached by service on agents.

The setting aside of the attachment was assigned for error in this court.

TRUNKEY, J. No foreign corporation shall do any business in this Commonwealth without an office and agent therein for the transaction of its business; nor until it shall have filed in the office of the secretary of the Commonwealth, a statement showing the location of its office or offices, and the name or names of its agent or agents: Act April 22, 1874, P. L. 108. A corporation may be sued in any county where it has an agency: Act 1851, P. L. 354. In the commencement of any suit or action against a foreign corporation, process may be served on its agent, and such service shall be good and valid in law, to all intents and purposes: Act 1849, P. L. 216. As shown by the statement, the office of the State Mutual Aid Association of Columbus, Ohio, is located at Greenville, in Mercer county, and Henry and Hoomer are the duly authoriezd agents, to transact its business in this state. The sole inquiry is, whether a foreign corporation, which is qualified to do business in this state by having complied with the statutory requisites, may be made a garnishee in an execution attachment.

This writ is in the nature of an execution against the defendant in the judgment on which it issues; but it is essentially in the nature of a suit at law against the garnishee, who may appear, plead, have a trial by jury, and writ of error, as in other actions at law: *Fithian v. New York & Erie R. R. Co.*, 7 Casey 114. In that case it was decided that a foreign corporation that had accepted the privilege of extending its works through this state, upon the condition,

"that in all suits or actions which may be brought against said company, the service of process upon any manager, toll-gatherer, or other officer of the company shall be as good and available in law as if made on the president thereof," and that said company shall keep an officer resident in the county of Susquehanna, could be made a garnishee in an attachment execution. There the defendant resided in New York, and had obtained judgment against the corporation in that state. It was said that the true intent of the 9th Sec. of the Act of 1841, P. L. 29, was to bring the corporation within the jurisdiction of this state, to answer in all suits or actions at law which might be brought against it; and that an attachment execution is within the meaning of the act. Now, by general statutes, all foreign corporations, as a condition on which they may transact business in this state, must establish an office and have an agent, a chief purpose of which is, that process may be served and such corporations be compelled to answer in all suits or actions brought against them. These statutes are so comprehensive as to embrace all actions to which such corporations are liable, and have like effect on them as the Act of 1841 had on the railroad company, to which it specially applied. The language of that act relating to suits, service of process and keeping an agent, is substantially the same as in the general statutes of later date, and if that embraced an attachment execution, so do these. The one made service on the manager or other officer, resident in the county, as available as if made on the president; the others declare that service upon the agent "shall be good and valid in law to all intents and purposes."

Natural and artificial persons, citizens of other states, who are doing business here ought to stand on an equal footing with each other and with the citizens of this state. A natural person, who is a citizen of another state, on coming within the jurisdiction of our courts is liable to all actions as if resident in this state; and legislation has done much to place foreign corporations on equality with domestic, as respects the rights to sue and the liability to be sued. No reason exists why a foreign corporation engaged in business here should be exempt from attachment process. It is a proceeding against the garnishee personally, for the value of the thing attached, when the thing itself is not produced. If a debt be attached, it compels payment to the creditor of him to whom the garnishee is indebted. The object is to appropriate the debtor's assets to payment of his debts, and this object ought to be favored. It may be accomplished whenever the court has jurisdiction over the person who has actual possession of the property, or who owes the debt, as well as when the property may be taken into possession by the officers of the law: *Childs & Co. v. Digby*, 12 Harris 23.

We are of opinion that a foreign corporation can be made a garnishee. No other question is presented, and none which may arise hereafter can be anticipated.

The order of May 15, 1880, setting aside the service of the execution attachment upon the State Mutual Aid Association of Columbus, Ohio, as the garnishee of defendants, is reversed, and *procedendo* awarded.

McGurk v. Superintendent of County Prison.
Criminal Law—Discharge after two terms' imprisonment.

Either application or assent of defendant to a postponement of his trial deprives him of his right to be discharged from imprisonment under Act of 18th of February, 1785, re-enacted by Section 54 of the Criminal Procedure Act of 1860. Nor need it appear that he expressly applied for or assented to the delay. His assent may be presumed from any action of his not naturally tending to produce such a result.

April 1, 1881. MERCUR, J. This is an application of the relator to be discharged from imprisonment under the Habeas Corpus Act of 18th February, 1785, re-enacted by section 54 of the Criminal Procedure Act of 1860.

If any person shall be committed for treason, or felony, or other indictable offences, it declares *inter alia*, "if such prisoner shall not be indicted and tried the

second term, sessions or court after his or her commitment, unless the delay happens on the application or with the assent of the defendant, or upon trial, he shall be acquitted, he shall be discharged from imprisonment.

The relator was committed at the August Term, 1879, charged with murder, and a true bill was found against him at the same term. He was tried at the January Term, 1880, and found guilty of murder in the first degree. A motion for a new trial was made in his behalf and the rule granted. On the last day of the April Term it was made absolute. On the last day of the October Term, 1880, being the fourth term after the new trial was granted, application for his discharge was made. At the January term following it was refused.

It is contended on behalf of the relator that he was entitled to be discharged from imprisonment at the end of the second term after the new trial was ordered under the Act of 1785. This presents the only question in the case. No complaint is made of any undue delay prior to the trial and conviction. What then was the object of the Act? It was to prevent wrongful restraints of liberty caused by malice and procrastination of the prosecutor, producing a wilful and oppressive delay in the trial: Commonwealth *v.* Sheriff, 16 S. & R. 304; Same *v.* Jailor, 7 Watts 306; Clark *v.* Commonwealth, 5 Casey 129.—The express language of the statute does not give this right of discharge in case "the delay happened on application or with the assent of the defendant." Thus either application or assent of the defendant to a postponement of the trial deprives him of this right. Nor need it appear that he expressly applies for or assents to the delay. His assent may be presumed from any action of his naturally tending to produce such a result. Hence if one under indictment induces the witnesses on the part of the Commonwealth to keep out of the way so their attendance cannot be procured, he is not entitled to be discharged under the Act, although two terms have intervened since his commitment; Res Publica v. Arnold, 3 Yeates 263. So when one under indictment moved at the second term to quash the indictment, and the court held the motion under advisement during the term, it was held the delay was equivalent to a postponement with his consent, and he was not entitled to his discharge under the Act; Ex parte Walton, 2 Wharton 501. The relator had a trial as soon after his commitment as he desired. There is no allegation that the postponement thereof beyond the second term was not on his application or with his assent. Then the letter and the spirit of the law were fully complied with. There was no unjust delay. After due effect was thus given to all the provisions of the statute the defendant intervened. He asked for and procured an order for a new trial. Having thus procured a new trial, which must necessarily be more than six terms after his commitment, he now seeks to apply a statute which limits the time between commitment and the first trial, to the interval of time between the new trial ordered and the second trial being had. We find no warrant for such application either in the letter or the spirit of the statute. It is further contended that, inasmuch as when a verdict is set aside, or a judgment reversed and a new trial awarded, the case goes back upon all issues of fact as if it had never been tried; therefore this statute is made applicable. Conceding the correctness of the rule as to the manner of form to be observed in the second trial yet the conclusion claimed by no means follows. The interval of time between the commitment and the close of the second term thereafter cannot be retracted, nor the statute which might then have been invoked, be made applicable to a second period of time, commencing long after the expiration of the time specified in the statute.

This application is based on the statute alone. Beyond a denial of its provisions to the case, no arbitrary or unjust detention is alleged.

We think under the facts the statute is not applicable. No other cause being shown for a discharge from imprisonment the prisoner is remanded.

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VOL. II. THURSDAY, MAY 5, 1881. No. 9.

COMMON PLEAS.

Inners v. Hartman.

Exemption—Defendant's interest in the property sold.

A defendant in an execution, who alleges that the property sold under it is that of his wife, is not entitled to have $300 of the proceeds of the sale thereof awarded to him under the provisions of the Act of 1849.

Exceptions to Commissioner's report.

WICKES, A. L. J. The property sold by the Sheriff in this case had been deeded to defendant's wife, at his instance, at the time of the purchase, and the Commissioner has found as a fact in the case, that defendant's act in procuring the deed to be made to his wife was not one in fraud either of existing or subsequent creditors.

The Commissioner also finds that the wife had no separate estate, and that the property was purchased in part with borrowed money, and that the husband is entitled therefore to claim the benefit of the exemption of $300 out of the proceeds of the sale.

The Commissioner is doubtless correct in finding the *facts* as he did, but in his application of the principles of law which govern in the distribution of this fund, we think he has fallen into error. Under the authority of Bowser *v.* Bowser, 1 Norris 57, the defendant cannot dispute the title of his wife to this property, even if he desired to do so. For if it was a fraudulent conveyance, he could not allege his own fraud as a ground of title, and if it was not, the presumption is it was a gift to her, so long as the deed to her stands unexplained. But the defendant does not pretend that he has any title or interest whatever to or in the property sold; but in the written argument submitted by his counsel asserts that the property belongs to his wife, who expects to sustain her title to it in the ejectment brought against her by the purchaser at the Sheriff's sale. So that this defendant is in Court claiming $300 out of the proceeds of the sale of real estate in which he asserts he never had any interest, and the Commissioner has awarded it to him.

The argument is that defendant's "right, title and interest," whatever that many be, was sold by the Sheriff, and that, having made his claim in time, he is entitled to $300 out of the proceeds of the sale, whether he really had any interest to sell or not.

Such a construction of the exemption Act of 1849 places an entirely new phase upon it, which, if carried out, might lead to very singular results. The Act was designed to secure to the unfortunate but honest debtor something out of the wreck of his estate; if personal property is claimed, in the language of the Act, it must be "owned by or in possession of the debtor"; if real estate, it must still be "the property of the debtor" which is exempt from levy and sale, and not somebody else's property, to which defendant stands in the relation of a stranger.

Suppose the appraisers had set apart a portion of this real estate to answer the defendant's claim, can it be supposed for a moment that he could, by virtue of such a proceding, enter upon and claim title to the property of a stranger because it had been levied upon to satisfy his debt —and if not to the land, why has he a better claim to the money for which the land sold?

It is decided over and over again that a defendant who denies the ownership of personal property cannot afterwards claim it and demand an appraisement and exemption, because the statute was not made to protect covinous debtors who seek to conceal their property from their creditors.

Again, a defendant who has conveyed real estate to his wife in fraud of his creditors, cannot afterwards claim $300 under our exemption statute, when it is sold under an execution issued against him—and this is not only because his

conveyance was for the purpose of hindering and delaying the creditors, but also because he has parted with his title, which however fraudulent against his creditors, binds nevertheless the parties to it; see Huey's Appeal, 5 Casey 220. He cannot even *say* the property belongs to his wife, or other relation or friend, if it hinders or delays his creditor, without losing the benefit of the exemption, even when his purpose is to gain time for the payment of the execution; see Strouse's Executors *v.* Becker, 2 Wright 192. So scrupulous have the Courts been in construing this statute—ever confining its benefits to the protection of the honest claim of an honest debtor to property honestly owned by him, discountenancing all evasion, concealment and fraud in all its forms, and never, in any instances, permitting a defendant to capture under its forms property, the title to which, he asserts, "is and always has been in his wife."

In Larkin *v.* McAnnally, 5 Phila. R. 17, the grantor of real estate attempted to claim the $300 exemption out of the proceeds of the land sold in his name, after he had conveyed it to another, and the Court said, that so long as his deed stood unrebutted by other evidence, "it is proof conclusive that he has nothing in the premises, and that from nothing, nothing can come." And so we say in this case.

And now, to wit, the report of the Commissioner distributing the amount realized at Sheriff's sale on the writ of *venditioni exponas* issued in this case, is amended. And the Court order and direct the amount reported for distribution by the Commissioner, after deducting the costs of execution, to be paid to the plaintiff in the judgment and execution, or to his legal representatives.

C. P. of Chester County.

Barnard v. McIntire.

Married Woman—Contract—Requisites to charge separate estate of.

A mechanic's lien for lime set forth that the lime was furnished "to the said Ann McIntire, who was and is the owner or reputed owner of the said tract, and Wm. McIntire, contractor, at whose instance and request the lime was furnished"; and "the said Ann McIntire is the wife of the said Wm. McIntire, and the said lime was furnished with the knowledge and consent and for the improvement of the said messuage and tract of land, which is her separate estate."

HELD, not to bind her separate estate.

Reserved point.

FUTHEY, P. J. This is a scire facias sur mechanic's lien, by which the plaintiff seeks to charge the real estate of a married woman.

Mrs. Ann McIntire is the owner of a life estate in a tract of land in East Nottingham, and the claim is for lime furnished for agricultural purposes, and the lien is filed, therefore, under the provisions of the supplement to the mechanic's lien laws, passed April 4, 1867.

The question was raised at the trial whether the claim set forth sufficient to entitle the plaintiff to recover. The Court reserved that question, and submitted the case to the jury on the facts, and, a verdict having been rendered for the plaintiff, it now becomes necessary to determine the reserved point.

The claim set forth that the lime was furnished "to the said Ann McIntire, who was and is the owner or reputed owner of said tract, and Wm. McIntire, contractor, at whose instance and request the lime was furnished." The claim then proceeds, "The said Ann McIntire is the wife of the said Wm. McIntire, and the said lime was furnished with the knowledge and consent and for the improvement of the messuage and tract of land which is her separate estate." Is this sufficient?

A married woman may charge her separate estate with debts contracted for *necessary* improvements and repairs; and, if lime is necessary for such improvement, she may contract for such lime.

But, in order to charge her successfully, all the elements necessary to render

her liable must appear by the record, and not merely be established by proof upon the trial. It must appear that she contracted or assented to the contracting of the debt; that the labor or materials *were applied* to the repair or improvement of her estate; and that they were necessary for that purpose. If the plaintiff fails in establishing any one of these matters, he cannot charge her. And it is necessary that they should appear on record; it is not enough to show them on the trial.

The claim in the case before us sets out two of the above requirements, that the lime was furnished with the knowledge and consent of the wife, and that it was for the improvement of her real estate; but it fails to set out that it was *necessary* for such improvement. In this particular the lien is defective.

In the case of Kuhns *v.* Turney, 6 Norris 497, the mechanic's lien set out, just as here, that the materials were furnished with the consent of the wife and for the improvement of her estate, but did not say they were necessary. The Court held this to be a fatal defect, saying, after a full opinion, "it follows that if a mechanic or material man would successfully charge the estate of a *feme covert,* for work and labor done, or materials furnished, he must not only prove on the trial, *but also set forth in his claim filed,* that such work or material was necessary for the proper improvement or repairs, as the case may be, of her separate estate."

That case rules the present, and we must, therefore, order that judgment on the reserved point, *non obstante veredicto,* be entered for the defendant.

KAIMES in his history of man, published 1774, says: "There is not a *single beggar* to be seen in Pensylvania. *Luxury* and *idleness* have got no footing in that happy country; and those who suffer by misfortune have maintenance out of the public treasury."

SUPREME COURT.

Greer v. The Chartiers Railway Company.

Railway Company — Subscription to Stock of—Rescision of.

One Greer undertook to obtain subscriptions to secure the building of a certain railroad; he took the subscription book, was active in obtaining subscriptions, subscribed himself, persuaded others to subscribe and kept the book about six months; he cut out his own name before he returned the book, because of a difference respecting payment for his services between himself and the agent of the company, from whom he had obtained the book. HELD, that he had perfected a contract with the railroad company, and was just as much bound to pay as though he had left his name on the book.

Error to the Court of Common Pleas of Washington county.

TRUNKEY, J. A number of persons, including Wesley Greer, proposed to subscribe for capital stock of the Chartiers Valley Railroad Company upon certain conditions, which proposition was offered to and refused by the Chartiers Railway Company, by resolution, reciting that it had received from the Pennsylvania Railroad Company such assurance of pecuniary aid, as would, with proper effort on the part of the people of Allegheny and Washington counties, insure the early completion of its railroad, offered for sale five thousand shares of its capital stock, and appointed J. H. Ewing its agent in Washington county to receive subscriptions. Books containing said recital and resolution and terms of subscription were furnished by said company to said Ewing, who procured the assistance of several persons in obtaining subscriptions, among them Wesley Greer. From the testimony of Greer, it appears that he had been active in soliciting the former subscriptions, the object being to secure the building of the road; that he was active in soliciting these subscriptions; that he took the book, subscribed himself, persuaded others to subscribe, and kept the book about six months; and that he cut out his name before he returned the book because of a difference respecting payment for his services between himself and Ewing. The single assignment of error is to the Court's refusal to charge that the defendant's subscription was revokable at any time be-

fore he returned the book to the company or its agent, and that if he returned it with his subscription erased, he is not liable. If an agreement was made between the company and Greer there was no error.

"A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise." The company held out the promise, never retracted it, all the time has been ready and willing to perform it; and the only point in dispute is, whether Greer actually accepted it. This point is not settled by conceding that Greer, at the time he subscribed, and before he had arisen from his seat or closed the book, could have erased his name and left the proposition as if he had not signed and stipulated the number of shares. He did nothing of the kind; but his subscription remained on the book for months. Until acceptance, the party making the offer may withdraw it; after acceptance, the obligation is mutual, and both parties are bound. This is the governing principle where the contract is made by letter. An offer by letter is a continuing one until the letter be received, and for a reasonable time thereafter, during which the party to whom it is addressed may accept the offer, unless he shall have received notice of the withdrawal of the offer. If the offer be accepted before notice of its withdrawal, the bargain is struck; there is an agreement founded on mutual assent. This assent is at the moment the letter of acceptance is put in the mail; Adams *v.* Tindsell, 1 Barn. & Ald. 681; 1 Par. on Con. 484; Chitty on Con. 14. The Chartiers Railway Company made a continuing offer, which became an agreement with each acceptance for the number of shares for which he subscribed. At the time a person signed his name, as a continuance of his act, he might have erased it, as one who had written an acceptance for an offer by letter before mailing the same might destroy it. But if the subscriber returned the book to the company's agent he could not afterwards withdraw his subscription, for he had completed the agreement. Greer was acting as agent in soliciting subscriptions, no matter whether for pay or not, and by procuring subscriptions under his own name he declared his acceptance, and admitted his agreement for the stiuplated number of shares. The book was not his, he had no right to its possession, but for a specified use. In that use he exhibited the evidence of his agreement with the company to every subsequent contracting party. Had the book been accidentally destroyed there was ample evidence of the contents of the written contract, upon which he could have held the company to performance; or, if it refused, to payment of damages. Clearly the company was bound to him the same as to any other subscriber, and so was he to the company. While he retained the book, the written contract was in his hands; its validity did not depend on the conduct of the depositary, and its unauthorized mutilation did not annul it.

The learned judge of the Common Pleas was of opinion that, upon the facts admitted by the defendant, he had perfected a contract with the plaintiff, and was just as much bound to pay as though he had left his name on the book. We are of the same opinion.

Judgment affirmed.

A MOST extraordinary method formerly prevailed in the fen countries, of punishing those who should neglect the repair of the levees or sea mounds. Those who do suffer them to decay, whereby the water entereth and drowneth the country, they are by certain custom apprehended, condemned, and staked in the breach, there to remain forever, as a parcel of the foundation of the new wall that is to be made upon them. How would this do for some city Street Commissioners?

YORK LEGAL RECORD.

VOL. II. THURSDAY, MAY 12, 1881. No. 10.

COMMON PLEAS.

Raffensparger v. Bender.

Married Woman—Liability of—Acts of 1718 and 1855.

B., a married woman, was deserted by her husband. —Three years after such desertion, she borrowed money from the plaintiff for the purpose of paying premiums due on a life insurance policy, held by her on her husband's life, and one year later borrowed a further sum to enable her to engage in the millinery business. In an action brought against her to recover the money loaned, HELD, that the plaintiff was not entitled to recover either of the sums of mon.y loaned to her.

A married woman is not liable for debts as a *feme sole trader*, unless she has engaged in some trade, business or employment pursued by her for a livelihood to constitute her a trader.

A judgment entered upon the bond and warrant of attorney of a *feme covert* is a nullity, even though she was a *feme sole trader* at the time of its execution.

The facts in this case are sufficiently set forth in the Court's opinion.

W. C. Chapman, for plaintiff.

E. W. Spangler, for defendant.

WICKES, A. L. J. This cause has been submitted by agreement of the parties filed, under the provisions of the Act approved the 25th day of April, 1874.

There is no room for a serious contest as to the facts of the case. They are as follows:

The defendant, Mrs. Bender, was married to Theodore P. Bender, in June, 1867.

In September, 1870, she was deserted by her husband, he having left the county and state with the evident purpose of living apart from her.

On the first day of August, 1871, she borrowed from the plaintiff the sum of $212.80, for the purpose of paying premiums due on a life insurance policy issued in her name on her husband's life. On or about the 25th day of August, 1871, she further borrowed the sum of $287.20, from the plaintiff, with which to engage in business as a milliner, and gave him a judgment note bearing date Aug. 1st, 1871, for $500.00, the aggregate amounts separately obtained from him.

The plaintiff seeks to recover upon the ground that she, the defendant, was a *feme sole trader,* within the meaning of the Act, approved the 22nd February, 1718, and the 4th May, 1855, at the time she borrowed this money. The first amount borrowed was applied to the payment of the premium due on the life insurance policy, and the second was actually expended, or rather the sum of $250 of it was expended in the purchase of a stock of goods, with which, in September, 1871, she opened a store and engaged in business.

At the time however the money was borrowed she had taken no steps towards engaging in business; she had neither engaged a store room, nor bargained for her goods.

We think there can be no serious question in this case as to the liability of defendant for any part of this money, except the $250 invested in goods, and not perhaps a very difficult question as to that, if the opinion of the Supreme Court in Cleaver *v.* Scheetz, 20 P. F. Smith 500, means what it says. Chief Justice Agnew, in delivering the opinion of the Court said, "we now hold that a wife is not liable for debts as a *feme sole trader,* under the Act of 1718, as extended by the Act of 1855, to cases of desertion or neglect, or refusal of her husband to provide for her, unless she *has engaged in some trade, business or employment pursued by her for a livelihood to constitute her a trader.*"

This defendant had certainly not engaged in any "trade, business or employment" at the time she borrowed this money, and had she not subsequently purchased a stock of goods with part of the money borrowed, it could not be argued that she had incurred any liability, under the authority of this decision. But it was strongly urged, in the argument of the learned counsel who appeared for the plaintiff, that the subsequent employment of the $250, in the actual purchase of goods, rendered her liable, even supposing that apart from such purchase no lia-

bility had arisen. We think the position cannot be sustained.

We can perceive no reason for applying a different principle from that applied to the kindred cases, of money borrowed by a married woman or infant to purchase necessaries. It is abundantly decided, that even when the money borrowed is actually expended in the purchase of such necessaries, it cannot be recovered back. It is the conditions and relations of the parties at the time of the transaction which determine their rights and liabilities; and no subsequent acts can alter them; Walker *v.* Simpson, 7 W. & S. 88.

The effect of this construction of the *feme sole trader* act is certainly to "impale an honest debt on a very sharp point of law," and it is by no means certain that it will not in very many cases, deprive married women who have been deserted, of the benefits of the Act. In the majority of cases they are left without means, and compelled to borrow money as a preliminary step towards engaging in business. It is safe to assume they can not as a rule buy the first stock of goods on credit, so that the result would be, that as they cannot be made liable for money borrowed and cannot buy goods without money to pay for them, they are virtually deprived of the benefits of the act. It is we think, to be regretted that the Supreme Court, in construing this Act of 1855, did not require a married woman to be decreed a *feme sole trader*, as provided by the fourth section, before she could enjoy the privileges, or incur the liabilities defined by it. But our province is *non dare sed dicere jus.* For these reasons our decision must be for the defendant.

Exceptions to the above decision:

1. The Court erred in not deciding that the defendant could, under the Acts of Assembly of 1718 and 1855, borrow money for the support and maintenance of themselves and families and give their note for the same as a valid obligation.

2. In deciding that the defendant could not under any circumstances at the time she borrowed the money of the plaintiff, render herself legally liable for the money so borrowed.

3. In deciding that the claim of the plaintiff could not be legally recovered from the defendant, it being admitted or found to be an honest debt.

4. In deciding in favor of the defendant and in not deciding in favor of the plaintiff. *W. C. Chapman,*
Attorney for plaintiff.

The Court dismissed these exceptions in the following opinion:·

In dismissing the exceptions filed by the plaintiff to the finding of the Court in this case, we have only to add to what we have already said, that apart from every other consideration, the judgment is a nullity because entered on the bond and warrant of attorney of a *feme covert.* That she was a *feme sole trader* at the time, even admitting that to be true, would not give her power to charge her estate by confessing a judgment. She cannot do it under the act of 1848, nor can she under the act of 1855. Upon a proper application we would have stricken this judgment from the record.

And now to wit, the exceptions to the finding of the Court dismissed, and judgment entered for the defendant and against the plaintiff.

Gillen v. Haas and Ritter.

Certiorari—When allowed — Sufficiency of service.

A certiorari, applied for after the expiration of twenty days from the rendition of judgment will only be allowed where no legal service of the summons has been made.

A return that service was made "by leaving a copy of the original summons on the defendant Daniel Haas by leaving a copy at the dwelling house with a member of the family," though not technically accurate, is a sufficient compliance with the substantial requirements of the law.

Certiorari to F. H. Keesey, Esq.

N. M. Wanner, for certiorari.

E. W. Spangler, contra.

WICKES, A. L. J. The record of the Justice in this case, is so defective, that had the defendant applied within twenty days after judgment was entered, for a writ of certiorari we would set aside the proceedings.

But the indulgence accorded suitors in cases of this kind, of making application after the expiration of twenty days, seems to be confined to cases where no legal service of the same has been made.

The second exception raises this question in the case before us:

The Constable's return is "served by leaving a copy of the original summons on the defendant Daniel Haas by leaving a copy at the dwelling with a member of the family, Dec. 14, 1878." The service upon Ritter is admitted to be correct, but upon Haas it is said to be defective.

In Barr *v.* Purcil, 2 Phila. R. 259, "the service was by leaving a copy of the original summons at the dwelling of the defendant with a member of the family," and the Court held that it was a substantial compliance with the requirements of the Act, for leaving a copy of the original summons with a member of the family is equivalent, said the learned Judge, "to leaving the copy in the presence of one or more of his family."

In the case before us however, we have an additional difficulty, the return being that the summons was left at "the dwelling," instead of identifying the dwelling as that of the defendant.

But what dwelling can possibly be meant, other than that of the defendant Haas. It is not alleged that the copy of the original summons was left elsewhere, than at defendant's dwelling.

The return is certainly not technically accurate, but we think the substantial requirements of the law have been complied with.

In Snyder *v.* Carfrey, 4 P. F. Smith 93, Woodward, C. J., takes occasion to say, that "very few Justices of the Peace can make up records * * * which can withstand the criticism of a certiorari * * * but that the legislature meant that Supreme Courts should exact no unattainable precision of procedure, but only such substantial compliance with the letter and spirit of the statute, as would generally be within the competence of the magistrate."

The depositions submitted are too contradictory to aid us, even were it proper to consider them on the hearing of a certiorari—but in sustaining the service of the summons, we leave the defendant without a case.

And now to wit, proceedings affirmed.

Joseph Dellone et al., v. John Wagner.

Death—Presumption of time of.

The absence of all evidence showing that the defendant was living at the time of the entry of judgment against him, and the testimony of two practicing physicians that the body of the deceased defendant must have been in the water (he having been found drowned) before the day on which judgment was entered as aforesaid, is sufficient proof of such death to induce the Court to set aside judgments entered against him at or after said period.

Rules to show cause why judgments against the defendant should not be set aside, and attachment executions vacated.

WICKES, A. L. J. I can see no reason to doubt that John Wagner the defendant was dead at the time the executions were issued in the various cases in which rules were granted.

He left home on the 20th day of March, 1879, and never returned alive. Members of his family made search for him and it is quite certain that he was in York after that time. The latest information we have of him alive, is that furnished by the ticket agent of the Northern Central Railway Company, who sold him a ticket for Hanover Junction about five o'clock on the afternoon of 22nd March, 1879. The agent informs us the defendant was under the influence of liquor at that time. From that date until the 24th April, 1879, nothing was seen or heard from the unfortunate man, and then his body was found in the Codorus creek, not very far from York. A considerable sum of money and his watch and chain were upon his person when found, and memoranda showing his presence in York between 20th and 22nd March.

The coroner, a physician of long standing and Dr. McKinnon, also a practicing physician of over twenty years' ex-

perience, both examined the body when found, and both testified that judging from its condition, which they minutely described, and taking into consideration the season of the year and the chilliness of the water, it must have been in the water a month. Dr. Ahl, the coroner, says a month—that such a state of decay could not have taken place in twenty days, and Dr. McKinnon is quite as positive, when he repeats that the body must have been in the water twenty-five or thirty days, or more.

We have then the opinion of two physicians of long professional training and experience, as to the period when death must have occurred—an entire absence of all evidence concerning the whereabouts of the defendant, or the fact of his existence, during the interval between the purchase of the ticket to go to Hanover Junction, on the 22nd, and the earliest proceeding against him which was on the 25th, a period of three days, and we have in addition, the finding of the body not very far from the place where the ticket was purchased, when he evidently intended to go to another and more remote place.

I think it would be difficult in a case like this to present stronger evidence that the unhappy man lost his life before the 25th March, 1879.

That he is dead is certain; it is not therefore a question, as seemed to be supposed, of the presumption of life during a period of seven years. The single question is, when did death occur? And in the absence of all countervailing proof, we are bound to say it must have happened before the isuing of the earliest of these executions and before the judgment of Benjamin Leese and Jacob H. Sheffer was entered.

And now to wit, the rules granted in these cases are made absolute, and the judgment and the attachment executions and *fi fa's* issued thereon set aside.

Abstracts of Recent Decisions.

Cases not otherwise designated are Supreme Court cases.

Ante-nuptial contract—After-acquired property.—In the absence of express words in an *ante-nuptial* agreement, bringing after acquired property of either party within its operation. HELD, that the widow had no life estate in such property which the husband died seized of.—*Rahe v. Real Estate Savings Bank,* 11 Pittsburgh Legal Journal 356.

Judgment—Satisfaction of.—A court has no power to order satisfaction to be entered of part of a judgment where the facts as to payment are disputed, and there is no agreement to submit to the decision of the court.—*Appeal of David Gregg,* 11 Pittsburgh Legal Journal 362.

Jurisdiction — Landlord and Tenant Act of 1836.—This court is without jurisdiction to restrain by injunction proceedings under the landlord and tenant act of 1863. The remedy must be by appeal or *certiorari.—Reynolds v. Davis et al.,* (Luzerne C. P.) 10 Luzerne Legal Register 112.

Mechanics' lien—New machinery in old mill.—A mechanic's lien will not lie against an old mill for new machinery placed therein under any lien law now in force in this Commonwealth.—*Haslett v. Gillespie et al.,* 11 Pittsburgh Legal Journal 353.

Taxes—Personal property on the premises.—Personal property, bought by a landlord at a sale under his distress for rent in arrears, and by him left in charge of the tenant, subsequently sold by him at private sale to another party, and by the latter left upon the premises in charge of the tenant, is not liable to levy and sale for taxes assessed against the landlord or tenant.—*Lewis v. Havard,* (Chester C. P.) 1 Chester County Reports 189.

YORK LEGAL RECORD.

VOL. II. THURSDAY, MAY 19, 1881. No. 11.

COMMON PLEAS.

Naille v. Keagy.

Certiorari—Time of Taking—Non-resident.

The defendant in the proceedings before the justice was a non-resident, and the summons against him was defective. Judgment was rendered against him by default, and a writ of *certiorari* was taken by him forty days after rendition of judgment.

HELD, In the absence of evidence showing when defendant had notice of the entry of judgment, the *certiorari* was issued too late, and the proceedings must be affirmed.

Certiorari to proceedings before a justice of the peace, and rule to quash writ.

W. C. Chapman for certiorari.

Blackford & Stewart, contra.

WICKES, A. L. J. The defendant in this case was a non-resident of the county at the time the justice issued his summons. Instead of making it returnable in four days as provided by the act of July 12, 1842, he proceeded in the usual form under the act of 1810.

The defect of course would be fatal, if the defendant had resorted to his writ of error in time. The difficulty, however, is that by his laches he has forfeited his right to have these proceedings inquired into.

Judgment by default was entered August 23, 1880—Sept. 10th defendant appealed and October 7th, writ of certiorari.

It was, therefore, twice twenty days after the rendition of the judgment before the writ was applied for, and no reason is assigned for the delay.

While it is conceded the justice had jurisdiction of the subject matter of the controversy, it is said he had no jurisdiction of the person of the defendant, and that hence the defendant was entitled at any time, to a certiorari.

But the weight of authority does not sustain this position. The defective summons would doubtless operate to entitle defendant to his writ at any time within twenty days after notice of the judgment, but the burden of proving by parol the time of notice, devolves upon the defendant in every instance, in which he seeks to escape the limitation fixed by the act, because of a defective process.

As the appeal was never entered, it does not operate we think as a waiver of defendant's right to a certiorari. How far it was a recognition of the validity of the judgment entered against him, and a waiver of the defect in the summons, is a question we need not stop to consider, as it was not raised on the argument, and is not necessary to our decision of the motion to quash this writ.

We think the defendant must show affirmatively that he moved within twenty days after notice of the judgment, and failing to do so, must abide by the judgment of the justice.

And now to wit, May 16, 1881. Rule to show cause why writ of certiorari should not be quashed is made absolute, and the proceedings before the justice affirmed.

Smith v. Insurance Company.

Evidence—Proof of Loss—Value of goods destroyed.

A statement of loss made out by the insured person, under oath, as required by the policy of insurance, is not evidence as to the extent or amount of loss in an action against the insurers.

Exceptions to Referee's report.

W. C. Chapman for exceptions.

N. M. Wanner and H. L. Fisher for report.

WICKES, A. L. J. The plaintiff in this is prosecuting an action of covenant against the defendant, to recover the value of "store goods" destroyed by fire, and covered by a policy of insurance issued by the company defendant.

It was proved on the trial of the case before the Referee, that in compliance with the terms of the policy requiring a particular account of loss to be furnished the company by the insured, "within thirty days after said loss," the plaintiff in this case did present to an officer of

the company a sworn statement of his loss, from which the company's committee, whose duty it was to investigate the loss, compiled a statement which they regarded as more suitable, in form, but not differing from plaintiff's statement in any material particular, save that ten dollars was added in the one and subtracted in the other.

The paper presented by the plaintiff, and from which this statement of his loss was prepared by the committee, was not, according to the evidence, such a particular account of loss, as the Courts have repeatedly held, was imported by those words, but the paper prepared by the company's committee was presented to the next meeting of the company and was received and acted on by the Directors, who passed the following resolution dated March 6, 1875: "The committee reported on William R. Smith's loss by fire Feb. 18, 1875, in Warrington township, of house furniture and store goods. The committee awarded loss at $2412.68. On motion agreed to pay him $2400, decided in the affirmative (of which amount $1000 has already been paid on the house furniture destroyed).

This paper, marked "C" by the referee, on which this action of the directors was had, was offered in evidence by the plaintiff, in connection with the company's action thereon, "for the purpose of *proving the loss of the stock of store goods mentioned in policy;* that the defendant had actual notice of said loss, and what it did in pursuance thereof, as also the appraised value of the goods saved, *and the value of the goods destroyed,* and generally to support the allegations of the narr." This evidence was admitted by the referee, defendant objecting.

If the only purpose for which this paper had been offered had been to show compliance with the condition of the policy requiring a particular account of loss to be handed to the company in thirty days after the fire, we think the referee would have been entirely correct in treating it as sufficient, however defective it may appear upon its face, because of the circumstances attending its acceptance by the company, and we do not understand the defendant's counsel to contest that position.

But when the paper was offered and admitted to prove the loss of store goods mentioned in this policy and further to *show "the value of the goods destroyed"* that was clearly error, unless there are circumstances in this case which prevent the well established rules of law from being applied, which govern in the production of evidence in such cases. It has been repeatedly ruled that a statement of loss made out by an insured person under oath, as required by the policy of insurance is not evidence as to the extent or amount of the loss, in an action against the insurers; see Commonwealth In. Co. v. Lennett, 5 Wr. 171, and Lycoming In. Co. v. Schreffler, 6 Wr. 188. And again in the case of Lycoming In. Co. v. Schreffler, 8 Wr. 269, it was held not to be evidence, although the report of loss was made out by the agent of the company, and sworn to by the party insured.

In what particular does the case before us differ from those cited? Why only in this—that the company defendant in this case, agreed by the resolution of their board of directors to pay this loss, but this agreement was only the formal method by which the sense of the board was ascertained—its failure to execute this resolve, infringed no legal right of the plaintiff—it certainly deprived him of no remedy he would otherwise have had against the defendant. It was very different from their action in reference to his preliminary statement of loss, for by lulling him into security by accepting his statement as sufficient, they could not, after the thirty days had elapsed within which he might have supplied its defects, be permitted to take advantage of conduct which had prejudiced his interests. The evidence indicates that at the time this resolution was passed the company entertained no suspicion whatever of

mala fides in this transaction. Can it be said, that at a subsequent period, when, as is alleged it had reason to believe the plaintiff had preferred a fraudulent claim, it was to be bound by the plaintiff's own statement of his loss, for it was substantially his, because it had resolved to pay that loss at a time when it was believed to be correct?

The very question at issue here is the truth or falsehood of the facts stated in that paper, and the plaintiff, if he would recover, must prove its truth by other evidence than the paper itself. It is a fundamental principle that a party waives no right, unless it appears that he knew his right and intended to waive it; and certainly there is no evidence in this case that at the time this resolution was passed the officers and directors of the company defendant had any knowledge that a fraud was being practiced upon them, and that knowing of the fraud they waived their right to defend against it. How then can the principles which govern the doctrine of equitable estoppel apply here. As we understand that doctrine, it must not only appear that a party has made admissions wholly inconsistent with the position he seeks to assume, but in order to give his acts and declarations, the character of an estoppel, it must also appear that they have influenced the conduct of the party by whom the estoppel is sought to be enforced and actually led him into a line of conduct which must be hurtful to his interest unless the party estopped is cut off from the power of retraction. We think the case before us is entirely wanting in all these essential features.

Nor must we forget that estoppels are said to be odious in law, because they always exclude the truth—and hence the courts have uniformly held the party asserting this doctrine to strict proof of all the facts necessary to call it into life. We are, therefore, of opinion that the admission of this evidence by the referee, is fatal to his finding in this case.

This view of the law renders unnecessary any critical examination of the very voluminous testimony which has been presented. It is not a case in which we are prepared to say that fraud is established, and if fraud were out of the question we could not ascertain intelligently the amount of loss sustained by the plaintiff upon the evidence submitted, apart from the paper marked "C" which we have said is not evidence for that purpose.

Report of Referee set aside.

SUPREME COURT.

Lloyd's Appeal.

Contract—Set-off—Decedent's estate.

A., becoming indebted to his employer, B., gave, on a settlement of their account, a judgment note for the amount of the indebtedness, and remained for about eight months thereafter in B.'s employ. He then quit the employment, but soon after resumed work under an agreement that he was to be paid his wages as fast as earned, without regard to any claim B. had against him. B. subsequently died, and on a distribution of his estate A. claimed and was allowed his wages from the date of the giving of the note. HELD, to have been error; that any portion of the wages unpaid during the eight months should, in the absence of an express contract to the contrary, have been applied to the judgment.

Appeal from the decree of the Orphans' Court of Cambria county.

GORDON, J. If the contract made between Thomas J. Lloyd and D. H. Kinkead, the appellee, on or about the 24th of May, 1876, was in its terms retrospective, that fact must have been established by some evidence not now exhibited to us.—We have examined the testimony as it is found in the record before us, with some care, and by it a condition of things about as follows appears: Kinkead was in the employment of Lloyd, altogether, about one year, commencing on the 15th of September, 1875. On the 22nd of May following, Kinkead, having for some reason become dissatisfied, abandoned that employment. Soon after this agreement, which forms the subject of the present controversy, was made. Its terms are detailed by two witnesses—Thomas Davis and John G. Bearer. The first of these says that Lloyd asked him

to see Kinkead and induce him, if he could, to return to his employment, and in the language of the witness, "He said that if he came back he would pay him the money as he earned it, without regard to any claim he had against him; that he could have it whenever he wanted it; that he did not want Harry to work for him and credit it on anything." The witness further says that he communicated this to Kinkead, and advised him to return, and that he did go back and remain with Lloyd for a short time. Bearer, the second of the above named witnesses, says he heard a conversation which occurred between these parties, and narrates it as follows: "Harry said he wished his money as he earned it, or he couldn't live. They were talking about Harry's indebtedness at that time, and Tom and he agreed he wouldn't take his wages on that. I don't remember that he said he would give him enough to live on and not credit it on his indebtedness. Harry was to go into the yard, and work as he was working before. I heard nothing of that (that he would never collect Harry's indebtedness of him). That was the particular bargain, that he was to have his wages as fast as he earned them —nothing was said about how often he was to be paid; that was the big trouble between them; it was to be paid just as he earned it. I can't say how long Harry remained after that. I think it was in May or June this conversation took place."

This, then, was the bargain between these parties, and we say, with Mr. Justice Strong, in Reed *v.* Penrose's Executrix, 12 Casey 234, that though a party may, by express contract, waive his right of set off, and such a contract, founded upon a consideration, would be binding upon him, yet he can be deprived of that right by nothing less than a contract. But the contract in the present case was wholly prospective. Kinkead was to return to his employment with Lloyd, and was to have his wages as he earned them, without set-off on his indebtedness to Lloyd. In all the testimony there is not so much as a hint that this contract was intended to affect Lloyd's right of set-off as to the wages which had been previously earned. Indeed, the principal object at which Kinkead aimed, so far as we can see, was to prevent in the future what had occurred in the past, the application of his wages, or any part of them, to the judgment of his employer. This he accomplished by the bargain which was made; he returned to his former position, and now if he gets what he contracted for he should be content.

He was entitled to his wages in full, less the payments made upon them, from the time he returned to Lloyd's employment, in May, 1876, until September 26th of the same year, but from September 15, 1875, to the 22d of the succeeding May, any of his wages remaining due and unpaid are properly applicable to the Lloyd judgment.

The decree of the court below is now reversed and set aside at the costs of the appellee, and it is ordered that redistribution be made in conformity with the above opinion.

Abstracts of Recent Decisions.

Assignee — Opening account of. — Where there has been gross negligence or wilful fraud on the part of an assignee, the Court may, in its discretion, open his account, even though it has been confirmed absolutely and an auditor had been appointed to distribute.—*Coldren's Estate* (Lancaster C. P.) 12 Lancaster Bar 195.

Criminal law—Sale of instruments to prevent conception.—Neither the common or statute law in Pennsylvania prohibits the sale of instruments to prevent conception.—*Com. v. Leigh* (Philadelphia Q. S.) 38 Legal Intelligencer 184.

YORK LEGAL RECORD.

VOL. II. THURSDAY, MAY 26, 1881. No. 12.

ORPHANS' COURT.

Becker's Estate.

Attachment — Decedents' Estates — On administrator and on debtor.

A policy of life insurance was made payable to the assured, "or her executors, administrators or assigns." HELD, that the interest of her husband, who was also her administrator in said policy, was such an interest as could be subjected to the operation of the attachment laws.

Such an interest can be attached in the hands of the insurance company as well as in those of the administrator.

Two writs of attachment were issued in this case, attaching the interest of the same defendant, the first being served upon the administrator, and the second upon the Insurance Company, debtor to the estate to the amount of the insurance. HELD, that the first attachment was entitled to the fund.

Exceptions to Auditor's report.

The facts in this case are sufficiently set forth in the Court's opinion.

John Gibson for exceptions.

S. H. Forry for report.

May 16, 1881. WICKES, A. L. J. The fund to be distributed by the Auditor in this case was the proceeds of a policy of insurance payable to the assured, "or her executors, administrators or assigns."— Shortly after the death of the assured and immediately after the issuing of letters of administration to Levi Becker, her husband, Elias Altland, a judgment creditor of Becker, issued an attachment execution, which was served upon him as administrator, attaching his interest in this fund.

Subsequently, and before the insurance company had paid over the money to the administrator, Edward Jacobs, another judgment creditor, attached the interest of Becker in the hands of the company. The question is one of distribution under these facts.

The auditor has awarded the money to Altland under his attachment; this is the error assigned.

The act of the Legislature approved 27 July, 1842, relating to foreign attachments, enables creditors to attach "any interest which any person or persons may have in the real or personal estate of any decedent, whether by will or otherwise," "in the hands or possession of the *executor or administrator, or in whose hands or possession soever the same may be*, as fully and effectually as in other cases," and the act of 13 April, 1843, applies the provisions of the act of 1842 to execution attachments. Then followed the act of 10 April, 1849, which authorized the issuing and service of the process, "at any time after the interest which any person or persons may have in the real or personal estate of any decedent, shall have accrued by reason of the death of such decedent." It seems clear from the language of the acts referred to, that the interest of Becker, in the estate of his wife, was such an interest as could be subjected to the operation of our attachment laws.

But in whose hands could this interest be attached? In the hands of the administrator, or in those of the company, debtor to the estate of decendent, or in the hands of either or both, according to the order in which the writs were served?

To overleap the executor or administrator and make a debtor to the estate garnishee is certainly attended with very serious difficulties. It cannot fail to embarrass the settlement of estates, and tend to dislocate the whole machinery of the law applicable to that subject. The administrator is first entitled to the estate to pay debts, expenses of administration, &c., and he cannot so employ the money belonging to the estate, or file his account unless he has possession of the fund. The reported cases, so far as I have examined them, are all or nearly all cases in which either the executor or administrator, was served as garnishee or joined with others in that capacity; and this gives at least a negative support to the doctrine of inconvenience to which I have adverted. Such was the case of Bouslough *v.* Bouslough, 18 P. F. Smith 495. William Bouslough was served as garnishee in his own right, and as exec-

utor of Jacob Bouslough, and Henry Fleck was also a garnishee. Sinnickson v. Painter, 8 Casey 384; Lorenz's administrators *v.* King, 2 Wright 93, and many other cases are of the same character, and in all we have examined, either the executor or administrator has been served as garnishee, either singly or jointly with others, or when not served, it has been in cases where an account has been settled by an administrator showing a balance in his hands. Such was Brady *v.* Grant, 1 Jones 361; and Baldy *v.* Brady, 3 Harris 103.

But not one of these cases decides that because there is an administrator, that debts due the decedent's estate are entitled to immunity and cannot be attached in the hands of the debtor, as well as in the hands of the administrator, and the rule which the Chief Justice who delivered the opinion in Gochenour's executors *v.* Hostetter, 6 Harris 414, said he deduced from these acts was, that "if by virtue of them an executor may be made garnishee than by the most express words of the same act, any man may be made garnishee in whose hands the debtor's legacy or interest may be found." Indeed the phraseology of the act is so broad that it seems impossible to escape this conclusion.—The object of the attachment and its service is to warn the garnishee not to pay over the amount in his hands to the heir of decedent, the defendant in the execution, not to warn him to hold the money as against the administrator. The right of the attaching creditor is only the right of the defendant whose interest he attaches, and the defendant's interest is only in so much of decedent's estate as may be left after the settlement of his estate.

Suppose the garnishee paid over to the administrator, the money attached, with notice of the attachment, why would not whatever excess remained after the administration accounts were settled, be subject to the lien of the attachment, even in the hands of the administrator? I know of no case which decides this question, but it is difficult to perceive any good reason, why an auditor in distributing such balance, should not appropriate it to the payment of the attaching creditor, precisely as if it had remained in the hands of the garnishee. But what we have said has reference to cases in which the first attachment is served upon the debtor to the estate, and yet more forcibly when no administrator has yet been appointed.

When letters of administration have been taken out, and the attachment first in point of time, has been served upon the administrator as in this case, must such service be deferred to a later attachment served on the individual debtor? We think not. A writ served upon the administrator binds the whole interest of the defendant in the estate; no matter in whose hands these scattered interests may be, the lien of this attachment is impressed upon them. Subject, first of all to the rights of creditors whose debts are subsisting and valid in law and equity, and then perhaps, although we do not mean so to decide, subject to the lien of other attachments laid in the hands of debtors to the estate, prior to the attachment served upon the administrator. But as in the case decided by the auditor, the writ first served was upon the administrator, who has constructive possession of the estate, and represents it for all legal purposes, we think he correctly awarded the fund to Altland.

And now to wit, May 16, 1881. Exceptions to report of auditor distributing the estate of Mary Ann Becker, deceased, dismissed, and report confirmed.

An attorney, not celebrated for his probity, was robbed one night on his way from Wicklow to Dublin. His father meeting Baron O'Grady next day, said, "My lord, have you heard of my son's robbery?" "No, indeed," replied the baron, with a good degree of surprise; "pray, *whom did he rob?*"

SUPREME COURT.

In re Pine Street.

Borough of York—Streets in—Appointment of viewers.

Certiorari to the Court of Quarter Sessions of the Peace of York county.

The facts in this case, together with the arguments of counsel concerned, will be found in *In re Pine Street, 2* YORK LEGAL RECORD 5. To these proceedings this writ was taken.*

Jas. W. Latimer for plaintiff in error.

W. F. Bay Stewart and E. W. Spangler for defendants in error.

May 16, 1881. PER CURIAM. The proceedings are affirmed, upon the opinion of the learned judges of the Court below, dismissing the exceptions to the report of the viewers.

Proceedings affirmed.

*See also *In re Pine Street*, 1 YORK LEGAL RECORD 133, and *Extension of Pine Street, id.* 21.

Coatesville Gas Co. v. Chester County.

Gas Company—Taxation of real estate of.

A lot of land owned by an incorporated gas company, on which are erected the works necessary for the manufacture and distribution of gas, and which is wholly included in the capital stock of the company and on which a corporation tax is paid to the state and county, is not made subject to taxation as real estate by Art. IX, Secs. 1 & 2, of the Constitution of Pennsylvania, or the Act of May 14, 1874.

These sections of the Constitution merely impose restrictions on future legislation, and do not repeal any existing laws.

The Act of May 14, 1874, goes no further than to declare what property shall not be exempt from taxation.

Error to the Common Pleas of Chester county.

The facts in this case, together with the opinion of the Court below, will be found in *Coatesville Gas Co. v. Chester County, 2* YORK LEGAL RECORD 10.

May 2, 1881. MERCUR, J. The plaintiff in error is a corporation chartered by special Act of Assembly in 1868, with the right and authority to supply the Borough of Coatesville and its vicinity with gas light; but to be subject to and managed under the general Act of 1857, relating to gas companies. The corporation owns a lot of land situate in the Borough of Coatesville, on which are erected a brick building containing its furnaces, retorts and machinery for manufacturing gas, and its reservior for retaining and distributing the gas through pipes along the streets of said borough. This lot and the improvements are used only for the manufacturing and supplying of gas according to the corporate powers of the company, and they are necessary and indispensable therefor. The corporation is a stock company, and its revenues exceed its expenses, so that dividends are declared to its stockholders. The lot described, with the improvements thereon, are a part of the capital stock of the corporation, and are wholly included within the same, and, as such, pay the usual state tax to the Commonwealth. The stock is owned by individuals, who are liable to pay, and do pay, taxes thereon to the State and to the County of Chester.

The claim now is also to impose a county tax on the lot, as the real estate of the corporation. It is conceded that prior to the Constitution of 1874, the lot was not so chargeable under the authority of West Chester Gas Co. *v.* County of Chester, 6 Casey 232. It is, however, contended that it is taxable as real estate under Art. IX, Sections 1 & 2 of the present Constitution, and the Act of 14th May, 1874, passed to give effect thereto.

It was held in Lehigh Iron Co. *v.* Lower Macungie Township, 31 P. F. Smith, 482; and in Indiana County *v.* Agricultural Society, 4 Norris 357, that these provisions of the constitution did not execute themselves so as to repeal any existing laws providing for the assessment, and collection of taxes. These sections like many others, merely impose restriction on future legislation, when it should thereafter be enacted. Perkins *v.* Slack, 5 Norris 570; Commonwealth *ex rel.* Chase *v.* Harding, 6 Id. 343.

Conceding that this property of the corporation is liable to taxation under

the Act of 14th May, 1874, the question is, in what manner? Is the object of that act to provide a mode of taxing or to declare what shall not be exempt from taxation? As we have already shown, this lot constitutes a part of the stock of the corporation which already paid a tax thereon to the Commonwealth, and the owners of the stock paid taxes thereon to the county.—We fail to discover anything in the Act indicating an intention to impose double taxation on this lot. It is indispensably necessary to enable the corporation to execute the office or fulfill the purpose for which it was chartered. It was held in Lehigh Coal & Navigation Co. *v.* Northampton County, 8 W. & S. 334, that the road bed, bermebank and tow path of an incorporated canal were not taxable as land under the Act of 15th April, 1834.—Nor were the water stations nor depots of a railroad corporation; Railroad *v.* Berks County, 6 Barr 70. Nor the toll house of a canal company so built as to be also occupied as the family residence of the collector. Nor the reservoirs of the canal and the machinery for raising cars; Wayne County *v.* Delaware & Hudson Canal Co., 3 Harris 351. Nor were the works of an incorporated Gas Company West Chester Gas Co. *v.* County of Chester, *supra*. Yet the Act of 1834 expressly made "all houses, lands, lots of ground . . . mills and manufactories of all descriptions, &c.," liable to taxation. The principle which appears to be recognized is that the public works of a corporation used as such, with their necessary appurtenances, shall be exempt from taxation as land, but be subject to it in another form; and that a Gas Company so far partakes of the nature of a corporation for public purposes as to be subject to the same rule; Northampton County *v.* Lehigh Coal & Nav. Co., 24 P. F. Smith 461; Same *v.* Easton Gas Co., 1 Chester County Reports 157.

It was urged that this lot is taxable as real estate of the Company, for county purposes, under authority of Chadwick *v.* Magines, 8 W. N. C. 451. The facts in that case were very different from those in this case. There the corporation was not a stock company, and paid no taxes in any form to the state under the general corporation tax laws of the Commonwealth. It was, then, an attempt to escape all taxation. As the specific property was not of the class which the constitution or the statute exempted from all taxation, it was properly held liable. It is true, some remarks of the judge who delivered the opinion would indicate additional reasons for the judgment, yet the fact of exemption from all other taxes is made prominent. It is there said, "surely it was never intended that such a corporation should be exempt from all taxation, while others are compelled to bear their share of the public burden."

In the present case, the corporation does bear such a share of the public burdens as the legislature has imposed on the class of corporations to which it belongs. We think the learned judge erred in entering judgment in favor of the defendant in error.

Judgment reversed, and judgment in favor of the plaintiff in error, with full costs, according to the case stated.

THERE was a little sensation in a dull session of the Superior Court of Pittsfield, Mass., the other day, when a lawyer, in presenting his case to the jury, said: "Gentlemen, my client has been accused of stealing watermelons; the dispute between the parties in this case began with an accusation of such theft. It was a boyish trick, as you all know, and probably *all of you, gentlemen, have stolen watermelons.*" The court smiled and frowned, the bar grinned almost out loud, and the jury looked as though whatever they had done they didn't want to be twitted of it, and they promptly brought in a verdict for the other side.

DOES forbearance become a sufficient consideration when it ceases to be a virtue?

YORK LEGAL RECORD.

VOL. II. THURSDAY, JUNE 2, 1881. No. 13.

COMMON PLEAS.

Weiser, Son & Carl v. Myers and Myers.

Affidavit of defence—Sufficiency of.

A paper accompanying the note on which suit was brought, setting forth that it was given for "Hall's Force Pump Washer," is not such notice that it was given for a patent right as will enable the promissor to make a defence thereto against a *bona fide* purchaser for value.

Rule for judgment for want of a sufficient affidavit of defence.

Blackford & Stewart for rule.

H. L. Fisher, contra.

WICKES, A. L. J. The affidavit in this case is that the notes were given for the right to use and vend a patent invention, and therefore within the act of April 12, 1872, and the words "given for a patent right," were not written or printed on the face of the note as required by the act.

These notes were transferred by the payee to the plaintiffs, and the only question is, had the plaintiffs such notice of the consideration, as renders them subject to the "same defence as if in the hands of the original holder or owner."

It is not questioned that the sole object of the legislature in requiring the words, "given for a patent right," written or printed on the face of the note, was to give notice of the consideration to all persons who might afterwards take the paper, and hence, notice given in any other way, as by publication in the newspaper, or by private memorandum, would answer precisely the same purpose.

The only question is as to its sufficiency in this case. When the notes were made, a paper called a "Certificate and Property Statement" accompanied them, which is in the following words: "Township of Warrington, County of York, State of Pennsylvania, July 18, 1877. This is to certify that I, Frederick Myers, have this day given two promissory notes for *Hall's Force Pump Washer,* bearing even date herewith, signed with my proper signature for the payment of the sum of two hundred and forty dollars, payable to A. W. Hall, or his order, 4 & 8 months after date at 1st National Bank of York, Pa., and for the purpose of obtaining the aforesaid credit, I have stated to A. W. Hall, or his agent, and hereby certify that I own real estate, 100 acres of land worth $3,000 dollars, and personal property worth $500 dollars, and that the aforesaid property is free and unencumbered."

Parties who invoke the aid of this act, it has been said by one of the Courts, must bring themselves strictly within its provisions—but whether this is the true rule of construction or not, what is there on the face of this paper to convey notice to the plaintiffs that the notes were given for a panent right—the language is for *"Hall's Force Pump Washers,"* the word *"patent"* does not occur, and if it had, what reason is there why one may not buy patented articles and give his notes for them — certainly such notes would not be within the terms of the act of 1872. It is the *patent right,* not *patented article* which the law contemplates. It is doubtless a hard case that the maker of these notes should lose his money—but *"ita lex scripta est"*—and we can only administer the law as it is.

Rule absolute.

Paup v. Hullubush.

Estoppel—Waiver of right.

Estoppel cannot take place where the truth of the facts is, by the party to be estopped, made the very issue to be tried.

A party will not be held to have waived a right unless it appears that he knew his rights and intended to waive them.

Rule to open judgment.

W. F. Bay Stewart for rule.

W. C. Chapman, contra.

WICKES, A. L. J. After a careful examination of this case we perceive no valid reason why this defendant should not have an opportunity to present his claim against the estate of Catharine

Paup. The only reason suggested is the settlement, which it is alleged he made with the administrator. But the difficulty is that *he* swears, his various claims did not enter into that settlement, and no one who has testified pretends that they did. Conceding that the paper signed by him in which he speaks of a settlement of all mutual claims and demands between himself and the estate, would be conclusive against him did he not allege under oath fraud or mistake, he insists, that he did not comprehend its full meaning, and further insists that it did not embrace and was not intended to embrace his claims against the estate. A paper of that character may always be inquired into, upon the ground of fraud or mistake.

The doctrine of estoppel is relied on, but estoppel cannot take place where the truth of the facts is by the party to be estopped made the very issue to be tried; nor is any one held to have waived a right unless it appear that he knew his rights and intended to waive them and this defendant swears he did not. These are familiar rules of law, and need no elaboration.

In Musser *v.* Oliver, 9 Harris 362, a ward, after attaining full age, declared she had received all that was due her by her guardian, and gave him her receipt in full, upon the strength of which the administrators made distribution; but it was held she was not estopped from claiming from the administrators the amount finally decreed her, they having made distribution of the assets without having taken refunding bonds. The failure to take refunding bonds was only important in fixing the liability of the administrators, and does not destroy the application of the principle of that case to the one before us, as to the operation of the doctrine of estoppel.

An administrator need not pay the debts of a decedent, and ought not to do so where the estate is insolvent. His only safe course is to preserve the fund for distribution by an auditor, and until the fund is thus legally distributed a creditor may come in with his demands. But the evidence shows that there was real as well as personal estate, so that no special hardship is entailed upon the administrator.

We think the qestions of fact in this case should be determined by a jury.

Rule absolute.

Markline v. Myers.

Justice of the Peace—Appeal from.

In an action of trover and conversion brought before a Justice of the Peace, to recover the value of twenty turkeys at $1.00 each, the matter was referred to Referees, who awarded the plaintiff fifteen dollars. HELD, that an appeal would not lie from this judgment, either by plaintiff or defendant.

Rule to strike off appeal.

D. K. Trimmer for rule.

C. M. Wolff, contra.

FISHER, P. J. In this case the plaintiff brought an action of trover and conversion before a Justice of the Peace, against the defendants, for twenty-one turkeys, valued at one dollar each. The case was referred to referees, who reported in favor of the plaintiff fifteen dollars, from which judgment the defendants appealed. The same having been entered in the records of the Court of Common Pleas, the plaintiff moved to strike it off on the ground that the judgment was final and could not be appealed from.

In Cook *v.* Dunkle, 1 Casey 342, it is said "there is no case to be found in our reports were the plaintiffs have been allowed an appeal from a judgment entered by a justice of the peace or alderman, upon an award of referees, unless he has lost, taking his demand as the standard of his rights more than ($20) twenty dollars, and this is supported by cases too numerous to be cited in this opinion.

The act of the 20th of March, 1845, Section III, P. L., page 189, gives the defendant an appeal where the plaintiff has one but if the plaintiffs cannot appeal, the defendant can not.

In the present case the plaintiff's claim was for twenty-one dollars, the award

was fifteen, and as the amount of her claim was not reduced twenty dollars, she could not appeal, and as she could not under the ruling of the case cited, the defendants can not. The appeal in this case must be stricken off, at the cost of the defendants.

Rule to show cause why the appeal should not be stricken off made absolute, and the defendants are ordered to pay the costs.

Com. ex rel. Ernst v. Metzger.

Summary conviction — Sufficiency of record.

An action to recover the penalty imposed for driving through a toll-gate without paying toll must be brought in the name of the company to whom the penalty is to be paid.

Certiorari to Solomon Myers, Esq.

W. H. Kain for certiorari.

WICKES, A. L. J. The action in this case is improperly brought at the instance of John Ernst, a toll-gate keeper of the York and Gettysburg Turnpike Company. The penalty sought to be recovered is to be "forfeited and paid to the use of the company" by the terms of the act, and hence the suit to recover it must be brought in the name of the company or for its use. An act like this must be strictly followed. There are other irregularities apparent on the face of this record, which it is not important should be discussed, as the one pointed out is sufficient to set aside the proceedings—but it is important a record in a case like this should show that the offence was committed within the jurisdiction of the justice, and the record before us does not, unless the information be called to its aid.

Proceedings before the justice are set aside.*

* See *Com. ex rel. Lewis v. Flinchbaugh*, 1 YORK LEGAL RECORD 1.

C. P. of Chester Co.

Com. ex rel. v. Longenecker.

The sureties on an administration bond are liable for a failure by the administrator to deliver to the widow of the decedent money or goods set apart to her for $300 election.

Such failure on the part of the administrator is a failure "well and truly to administer the goods" according to law and the condition of his bond.

This was an action of debt on the administration bond brought in the name of the Commonwealth at the suggestion of the widow of the decedent against the administrator and his sureties.

The facts sufficiently appear in the opinion of the court.

BUTLER, P. J. The court was requested to charge that the plaintiff cannot recover on the evidence presented. The point was reserved.

It is urged that the suit is premature, inasmuch as no recovery has been had against the administrator, and, also, that the failure of the administrator complained of is not covered by the bond.

The administrator absconded prior to the date of suit; and the plaintiff was thus excused from pursuing him.

We think the bond covers the failure complained of. By virtue of his office, the administrator obtained dominion over all the decedent's goods and effects. He took possession, as it was his duty to do. Whether the widow would be entitled to any part of it, was uncertain. Until demand for, and confirmation of, an appraisement, she could receive nothing. If she failed to make such demand, or the court failed to confirm the appraisement (as in Odiorne's Appeal, and other cases), he is responsible for the property to other persons. We need pursue the subject no further. The bond covers all property that may lawfully go into the administrator's hands, and enures to the benefit of all persons interested in it. Here the administrator held the property (out of which the complaint arises) subject to the widow's rights under the statute. When the court adjudged it to her, by confirmation of the appraisement, his duty was to withdraw from and deliver it. His failure to do so was a failure "well and truly to administer the goods," according to the law and the condition of his bond. That the property was, in part or wholly, money, does not affect the result. It is held to be unnecessary to appraise money. But it was the administrator's duty to take

possession of the entire estate and await the widow's demand, and, if it should be resisted, further await the decision of the court.

The point is disaffirmed.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Administration—Joint and separate.—Joint administration involves joint liability; and the interest of both the individuals concerned, and of the estate, forbid it, unless the parties mutually agree to accept the trust. Two separate and coordinate administrations on the same estate cannot be granted under the law of this State.—*Brubaker's Appeal,* 12 Lancaster Bar 201.

Exemption—Attachment of wages for board.—A defendant in a judgment obtained for board is entitled to the benefit of the exemption of three hundred dollars on an execution attachment issued in pursuance of the Act of May 8, 1876, (P. L. 139) against wages.—*Blythan v. Rescorla,* (Luzerne C. P.) 10 Luzerne Legal Register 124.

Judgment against wife—When it will be too late to take advantage of improper judgment against the wife.—A party bound by recognizance as bail for stay of execution in a judgment against a husband and his wife, cannot, after the stay has expired, relieve himself from liability by showing that the judgment was improperly taken against the wife.—*Jones v. Raiguel,* 2 Schuylkill Legal Record 89.

Justice of the Peace—Proceedings before.—After a hearing before a Justice of the Peace is concluded, additional testimony cannot properly be received in the absence of the opposite party, without a reopening of the proceedings and notice. Parol evidence is sometimes received, on hearing of certiorari, not as to the merits of the case, but to show what took place before the justice, and his conduct.—*Com. ex rel. v. King,* (Chester C. P.) 1 Chester Co. Reports 203.

Mortgage — Fraudulent — Rights of assignee of.—The assignee of a mortgage procured from a married woman on her separate real estate by fraud, coercion, and without consideration (of which the mortgagee had full knowledge, and in which fraud and coercion he participated), if not affected by the equities existing between the mortgagor and mortgagee, of which he had no notice, is, at least, compelled to show the circumstances under which the assignment was made, and the consideration therefor.—*Hoffsomer v. Smith et ux.,* (Luzerne C. P.) 10 Luzerne Legal Register 121.

Negligence—Province of Court and Jury.—Negligence is a question for the jury, if there be reasonable doubt as to the facts tending to prove it, or as to the just inferences to be drawn therefrom. If the facts are admitted or ascertained, and no inference of negligence could reasonably be deduced, it is the duty of the court to declare the law thereon, and take the question away from the jury.—*Baker v. Fehr et al.,* 38 Legal Intelligencer 204.

Negligence — What is not contributory.—It is not contributory negligence for a passenger to stand up on a ferry boat while in motion, so that she was thrown by an unusually violent landing of the boat, although if seated she would not have been injured.—*Ferry Company v. Monaghan,* 38 Legal Intelligencer 205.

Register—Granting of letters by—Review of.—Where the class entitled to administer consists of more than one person, the register may grant letters to all jointly, or to such one as, in his discretion, will most faithfully execute the trust, to the exclusion of the others; and, when properly exercised, his action is not reviewable by either the Orphans' Court or the Supreme Court.—*Brubaker's Appeal,* 12 Lancaster Bar 201.

YORK LEGAL RECORD.

Vol. II. THURSDAY, JUNE 9, 1881. No. 14.

SUPREME COURT.

Kraber's Appeal.

Ore Lease—Mined with advantage—Construction of.

A clause in an ore lease stipulating that if the lessees could not "get out two thousand tons gross per year, that there was a deficiency of ore or water, that two thousand tons could not be mined with advantage, then the parties of the second part shall pay for the ore mined by them at one dollar per ton, as aforesaid," goes in relief of the lessees if by the scarcity of ore or water 2000 tons cannot be advantageously mined, but what can be advantageously mined must be paid for.

In a suit in equity brought by the lessees to have the lease cancelled, and to restrain the lessors from proceeding further in an action at law to recover the royalty due under said lease, the Master in Chancery found that there was plenty of ore to answer the contract, and that though poor in quality, and not profitable to be worked in seasons of low prices, yet it is not wholly unfit to be worked, and cannot be pronounced to be so unmerchantable as to be a substance different from that contracted for. HELD, that under such a state of the case, the petition prayed for must be refused.

Writ of error from the judgment, and appeal from the decree of the Court of Common Pleas of York County.

By an article of agreement dated July 18, 1868, Louis J. Dellone and I. C. Dellone leased a piece of land containing twelve acres in Heidelberg township, York county, to Henry Kraber and C. M. Nes, for the purpose of digging, mining, washing and carrying away iron ore therefrom. The lessees were to erect a steam engine and other necessary machinery, and agreed to mine two thousand tons of ore per annum, and pay a royalty of one dollar for every ton of ore dug and mined, in quarterly payments. They further agreed that they would pay to the lessors not less than $2000 each year whether they mined 2000 tons or not "provided that quantity is to be had, and can be got out of the said demised premises in each year, and provided also, that a sufficient quantity of water can be had on the said field to wash such ore as shall be necessary with the lump ore to make up the two thousand tons per annum." At the end of the lease is another clause as follows: "And if the parties of the second part can not get out two thousand tons gross per year, that there was a deficiency of ore, or water, that two thousand tons could not be mined with advantage, then the parties of the second part shall pay for the ore mined by them at one dollar per ton as aforesaid."—Kraber and Nes entered upon the premises in August, 1868, and commenced operations. They continued mining ore till about April 16, 1868, when The Thomas Iron Company, who had purchased a large number of leases from them, including this one, commenced to mine on this property, and continued their operations till August 18, 1869. The transfer of this lease appears to have been made to The Thomas Iron Company on May 10, 1869.

The Thomas Iron Company quit work on August 18, 1869, alleging that the quality of the ore had deteriorated to such an extent as to render the working of the mine unprofitable, and offering to cancel and surrender the lease and deliver possession of the premises.

The lessors brought an action at law against Kraber and Nes, the original lessees, to recover one quarter's royalty (the royalty on 500 tons of ore which the lessors alleged the lessees could have mined in that time), and recovered a verdict in their favor and against the defendants of $589.83. A motion for a new trial was overruled, and judgment entered thereon, whereupon the present writ of error issued.

Pending the motion for a new trial in the action at law, the lessees, Kraber and Nes and the Thomas Iron Company, filed a bill in equity against the lessors, setting forth *inter alia,* the above facts, and averring that owing to the unmerchantable character of the ore they sustained great loss and damage in working the same, and prayed the Court for a decree ordering the lease to be delivered up for cancellation, as unjust and inequitable, and restraining the defendants (lessors) from proceeding further in the action of law already instituted by them against the plaintiffs (lessees).

The answer of the defendants (lessors) denied the unmerchantability of the ore, admitted the bringing of the action at law, and averred that such a defence could have been made in a suit at law, and that the plaintiffs had not stated such a case as entitled them to relief.

The report of a Master in Chancery found that there was plenty of ore to answer the contract, and that though poor in quality, and not profitable to be worked in seasons of low prices, yet it is not wholly unfit to be worked, and can not be pronounced to be so unmerchantable as to be a substance different from that contracted for. He therefore reported that a decree should be made ordering the plaintiff's bill to be dismissed with costs.

The Court below, FISHER, P. J., filed the following opinion:

We affirm the report of Thomas E. Cochran, Esq., the Master in the case, for the following reasons:

First, Because the party plaintiff can make every defense that could be made were suit brought on each payment when it becomes due, as stipulated in the lease, and because the defendants in this bill would be deprived of the privilege of showing that at certain times the ore could be mined and disposed of to advantage, although it might not be marketable at other times, depending upon the demand or want of demand for iron, should they be enjoined from proceeding at common law to enforce their claim.

Our opinion is that in any one year or years in which the ore was marketable and could be used to advantage that the plaintiffs in the bill would be obliged to pay the defendants the amount stipulated in the lease.

Second. Because the evidence is too vague, uncertain and contradictory to enable us to make a decree in favor of the bill, and because also there is not that preponderance of evidence on the part of the Complainants in this bill as required to enable the Court to grant the relief asked for.

And now, to wit, March 18th, 1878, bill dismissed and Complainants directed to pay the costs.

From this decree this appeal was taken.

H. L. Fisher and *W. C. Chapman* for appellants and plaintiffs in error.

John Gibson, H. M. North and *J. W. Simonton* for appellees and defendants in error.

PER CURIAM. We think the interpretation of the agreement given to it by the court below was substantially correct.—The concluding part of the agreement, properly interpreted would read as if written thus: "and if the parties of the second part cannot get out two thousand tons gross per year, because of a deficiency of ore or of water, so that two thousand tons cannot be mined with advantage, then the parties of the second part shall pay for the ore mined by them at one dollar per ton as aforesaid." The clause evidently goes in relief of the lessees if by the scarcity of ore or of water, 2000 tons cannot be advantageously mined, but what can be mined advantageously must be paid for. The verdict of the jury in the case at law establishes the plaintiffs' right to recover and the judgment must be affirmed.

In the equity case there is more difficulty owing to the closeness of the facts and the difficulty the master had in reaching and stating an entirely clear conclusion. Yet we think his conclusion did not reach the point of finding that the ore had deteriorated so far as to become entirely, or substantially, unfit for furnace use. Indeed he does not positively find that there was much deterioration, while it is conceded that the top ore was good when the contract was executed. His finding went so far as the evidence would seem to justify him; and the result is this, that there is plenty of ore to answer the contract, and that though poor in quality, and not profitable to be worked in seasons of low

prices, yet it is not wholly unfit to be worked, and cannot be pronounced to be so unmerchantable as to be a substance different from that contracted for. What future experiments may prove to be its real character we cannot say, but must decide upon the present state of the case. Decree affirmed with costs to be paid by the appellant and the appeal is dismissed.

A motion was made for a re-argument, which was granted, and after argument, the court filed the following decree:

May 23, 1881. PER CURIAM. After having heard the very full and able re-argument of this appeal our opinion remains unchanged. Decree as originally entered to stand.

Bressler's Appeal.

Evidence—Burden of Proof.

A claimant in an assigned estate proved that he was to receive $12.50 per month from the assignor for his services. He admitted that he lived in the assignor's house without paying rent therefor, and also that he practiced dentistry to some extent. HELD, that the presumption was against free rent, and that the claim was properly disallowed.

Appeal from the decree of the Court of Common Pleas of York County.

The facts are as follows:

George Pollinger and wife executed a voluntary deed of assignment for the benefit of creditors on the 9th day of September, 1878, to Washington Williams and Andrew Epply. The said assignees sold the real and personal property and filed an account of their administration of said trust in said Court of Common Pleas.

Upon the confirmation of said account the Court appointed an auditor to distribute the balance to those legally entitled thereto. At the time of said assignment there were liens against this real estate in amount exceeding that for which it was sold, under order of Court. The said appellant, prior to said assignment, had removed to the farm of said assignor under a contract to do the general farm work for $12.50 per month, and there was due said appellant at the time of said assignment, under said contract, the sum of $187.50.

The report of the Auditor, disposing of the various questions raised at the distribution, will be found in Pollinger's Estate, 1 YORK LEGAL RECORD 197. That portion of it referring to the question raised in this case, is as follows:

"J. T. Bressler presented a claim of $187.50 for labor performed for the assignor, and *for which he demands a preference to the amount of* $100. It appears, from the claimant's testimony, that he moved on the farm of the assignor, his father-in-law, on the 6th day of June, 1873, under a contract to do the general farm work on the same at $12.50 per month. He remained on the farm until June 6th, and soon thereafter moved to York. About the 1st of January, 1875, he returned to the farm for the same purpose, and under the same contract as before. He remained on the farm until April 1st, 1876, and for this last period he claims payment. It appears that in addition to the farm work he also practiced dentistry to some extent by consent of Mr. Pollinger. During the last term he paid no rent to Mr. Pollinger, and as the claimant did not say that he was to get $12.50, and also rent free, the presumption is against free rent. When asked how he supported himself and family during the time he got no wages, he replied that he did some dentistry and sold a few sewing machines; subsequently he denied being an agent for sewing machines that year; and he also failed to show that his profits from dentistry were sufficient to support himself and family. Taking into consideration all the facts and circumstances connected with this claim, your auditor is of the opinion it should not be allowed."

The exceptions filed to the report were dismissed by the Court (see Pollinger's Estate, *supra*) and the report confirmed, from which decree this appeal was taken.

W. H. Kain for appellant.

May 23, 1881. PER CURIAM. Assuming the facts as reported by the Auditor, we think he arrived at the right conclusion that defendant had no claim for which he was entitled to a preference

from the assigned estate. We think with him that the presumption was not that he was to pay no rent. The appellant was bound to make out a case and he failed to do so.

Decree affirmed and appeal dismissed at the cost of the appellant.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Evidence—Burden of Proof.—Where the freehold is situate in the county, and the defendant swears that there are no incumbrances upon it, the burden of showing that judgments against one of his *name* are liens upon it is imposed on the plaintiff.—*Henry et ux. v. Flanagan,* (Luzerne C. P.) 10 Luzerne Legal Register 128.

Insurance—Increase of risk.—Where a policy of insurance contained a provision that an increase of the risk, without the written consent of the secretary, would avoid the policy, it was held that plaintiff could not recover where the risk was afterwards increased, without the consent of the secretary; even though at the time the insurance was affected, the agent was informed of the contemplated change, and actually did charge a higher premium on that account.—*Insurance Co., v. Horan,* 2 Schuylkill Legal Record 95.

Execution—Sale of land after expiration of lien of judgment.—Where lands have been extended by an inquest at an annual rental, a *vend. ex.* cannot be issued for the sale thereof after the lien of the judgment on which it is issued has expired, and there has been no revival. Under the act of March 26th, 1827, the lien of the judgment must be kept alive, notwithstanding any process of execution upon it. If that is not done, the right to isue execution for the sale of lands upon which it was a lien expires at the end of five years from the date of its entry. The money arising from the half-yearly installments under an extension is payable, not necessarily to the plaintiff in the writ under which the lands were extended, but to the lien creditors in the order of priority of liens.—*Reynolds' Appeal,* 10 Luzerne Legal Register 129.

Unincorporated associations — Lodge of Free Masons—Liabilities of.—A charitable, benevolent and social association, such as a lodge of Free Masons, is not a common partnership, but partakes more of the character of a club than of a trading association. If the Lodge purchase real estate, erect buildings, or bordow money on credit, only those members who participate in the enterprise, either by assenting to the undertaking or by subsequently ratifying it, are liable for the debts contracted therein. Where, in such a venture, certain of the members affixed to a pecuniary obligation the common seal of the Lodge, which was not used by the order for such a purpose, the members who advised the affixing of the seal as well as the officers who attached it, are bound by it. Where suit was brought on such an instrument and judgment recovered against the Lodge without naming the members, such judgment is not a bar to a recovery in a suit on the same instrument against the individual members.—*Ash et al. v. Guide,* 1 Chester County Reports 205.

A NEGRO witness, on a horse trial in a New Jersey court, was asked to explain the difference between a box stall and a common stall. Straightening himself up, pointed to the square enclosure in which the judge was seated, and said, "Dat ar's what I calls a box stall dere whar dat old hoss is sittin'!" It took the sheriff some time to restore order in that court.

THE law of Juries—"Many are called, but few are chosen."

YORK LEGAL RECORD.

VOL. II. THURSDAY, JUNE 16, 1881. No. 15.

SUPREME COURT.

Reehling v. Byers et al.

Fraud—Conveyance of land from Son to Father—Requisite proof of fraud and collusion.

W. H. T., being heavily indebted, and apprehending that his property would be seized by a creditor who was about to obtain judgment against him, conveyed all his real estate unto his father. The deed contained a receipt for the payment of the purchase money in full, but the subscribing witnesses only saw part of it paid. Previous to this sale, W. H. T., had tried to borrow money from one Creep, and failing to do so, offered to sell the property for considerably less than that named in the deed. Shortly after this, and also prior to the sale, I. T., the father of W. H. T., and the grantee in the alleged fraudulent deed, attempted to borrow some money from the said Creep, and also failed. It was also proven that I. T., shortly after the suit brought by one of the creditors of W. H. T. against him (W. H. T.,) said that the said creditor would find out "what he would make out of that." "The longest pole will knock the persimmons." HELD, affirming the Court below, there was sufficient evidence of fraud and collusion between W. H. T. and I. T., to submit to the jury.

Upon a question of this kind the evidence must necessarily be allowed a wide scope. Any evidence of complicity being given, the acts and declarations of both parties are admissible.

Writ of error to the Court of Common Pleas of York County.

The facts in this case are as follows:

William H. Taylor is a resident of Newberry township, York county, Pa., and in the year 1876 and for some time prior thereto, he had been engaged in business in the village of Newberry in said township and owned real estate. A part of his real estate he sold to William H. Brinton, prior to that year, taking a part of the consideration in a judgment note against the purchaser. On April 1, 1873, William H. Taylor became surety for A. B. Kurtz on a note to Joel Brinton for $1000. Several years thereafter, Kurtz absconded, leaving his debts unpaid. Isaac Taylor, the father of William H. Taylor, also resided in said township and owned real estate. Some time in the spring of the year 1876, William H. Taylor made an effort to borrow money. He applied to John W. Creep, but Creep had none at that time and could not accommodate him. He then offered to sell Creep his house and lot for the sum of $800, but Creep, not wishing to buy more property at that time, declined to purchase. On June 23, 1876, William H. Taylor sold said house and lot and also the tract of woodland mentioned in the writ to his father, Isaac Taylor, for the sum of $1350. The deed was signed and delivered in the presence of two witnesses and acknowledged before J. H. Stonesifer, a Justice of the Peace. The deed was recorded in the office for recording deeds for York county. There was on the deed a receipt for the whole of the purchase money, signed by William H. Taylor, but the justice who took the acknowledgment and witnessed the receipt did not see the purchase money paid in full. He saw some six or eight hundred dollars of the purchase money paid over by Isaac Taylor to William H. Taylor. The justice counted the money at Isaac's request and paid it over to William H. Taylor. Isaac said, when he paid over the part of the money, in the justice's presence "that he had been disappointed but he would get the balance before night." When William received the money he called up his sister Mrs. Meredith, who held a note against him. —She produced the note. They calculated the interest due on it and he paid her a considerable sum on it, if not the entire amount due. The deed was delivered and the payment made late in the day and the witnesses left the house, without seeing the balance of the purchase money paid. No obligation for the unpaid purchase money was given in the presence of the witnesses. and it does not appear, except from the receipt on the deed, whether the whole purchase money was paid or not. Some time after William H. Taylor offered to sell his house to Jorn W. Creep, Isaac Taylor applied to him to borrow money. He did not name any amount, he desired to borrow, nor did he say what he wanted with the money. Mr. Creep, however, could not accommodate him, but proposed, if it was necessary to have the money, to assist him in procuring it from the bank. He did not get any money from Mr. Creep, or from the bank, with

Creep's assistance. In a conversation between Isaac Taylor and Wm. R. Byers, Isaac said Brinton had sued Wm. H. Taylor on that Kurtz note, and that "he will find out what he will make out of that." "The longest pole will knock the persimmons."

On the 10th of April, 1876, Joel Brinton brought suit against William H. Taylor on the note on which he was surety for Kurtz. The suit was referred to arbitrators, who on June 27, 1876, filed an award against William H. Taylor for the sum of $1,134.50. An appeal was taken to the Court of Common Pleas and after trial, judgment was entered against him, on February 26, 1879, for $1,174.00 and costs. On March 5, 1877, a *fi. fa.* to No. 76 of April term, A. D. 1887, was issued and the property conveyed as above mentioned, by William H. Taylor to Isaac Taylor, was levied upon and condemned. On June 2, 1877, on *venditioni exponas* No. 17 of July term, 1867, the property was sold by the sheriff of York county, as the property of William H. Taylor to said Joel Brinton for the sum of $722.00. After the delivery of the deed by the sheriff to said Joel Brinton, he caused proceedings to be instituted before two justices of the peace, against William H. Taylor, and he was put out of posession and Joel Brinton put into possession.

On December 28, 1877, Isaac Taylor executed and delivered to said C. F. Reehling the plaintiff, a deed of voluntary assignment for the benefit of the creditors of said Isaac Taylor. The inventory and appraisement of his estate showed that his estate was worth over six thousand dollars.

On the trial the defendants attacked the deed of William H. Taylor to Isaac Taylor, alleging that the same was fraudulent and collusive, and of no validity, so far as the defendants are concerned. The plaintiff contended that there was not sufficient evidence of fraud or collusion, at least so far as Isaac Taylor, the grantee in the deed, is concerned, to submit to the jury, and requested the Court to instruct the jury to find for the plaintiff. This was refused, and the Court, W'CKES, A. L. J.. charged the Jury as follows:

GENTLEMEN OF THE JURY:

The statute of 13 Eliz., which defendants have invoked and rely upon in this case, avoids all feoffments, conveyances, &c., made with an intent to delay, hinder and defraud creditors or others of their just and lawful actions, suits, &c., as fraudulent and covinous against the person or persons, his or their heirs, whose suits, actions, or debts by such guileful and covinous practices, shall or may be delayed, hindered or defrauded, saving only such conveyances, and upon good consideration and *bona fide,* as shall be made to any person who shall not have, at the time of such conveyance, any notice or knowledge of such covinous intent. This law is in full force in Pennsylvania. The question for you to ascertain from the evidence is whether the defendants have shown that the conveyance by W. H. Taylor to his father, Isaac Taylor, is within its scope and meaning. Before you can find that it is, you must be satisfied from the evidence: First, that Wm. H. Taylor, the grantor in the deed which was executed on June 23, 1876, was moved by a fraudulent and covinous purpose to hinder, delay or defraud Joel Brinton from the collection of the debt due him, in making the conveyance to his father—and secondly that Isaac Taylor to whom he conveyed, was acting in concert and collusion with him, animated in the same guilty purpose to hinder, by fraudulent means, this same creditor Brinton, from securing and collecting his debt.

It will not do that you believe one of the parties, W. H. Taylor, guilty of the fraud, unless you further believe the father, Isaac Taylor, was also a participator in it. It is the corrupt combination between the two, which renders the conveyance void as to W. H. Taylor's creditors.

Fraud, as I have said, is alleged—it must be proved. It is familiar law, that it cannot be presumed—the burden of proving it is upon the party who asserts its existence—and this alleged fraud must be established either by direct proof or by facts which warrant a presumption of its existence, clearly and conclusively proved (3 Norris 246). In other words, in the case you are now trying, you must find in the evidence direct proof of the fraudulent purpose of W. H. Taylor and his father, to hinder, delay or defraud Joel Brinton, a creditor, or you must find such facts, clearly and conclusively proven, as will justify you in presuming the existence of fraud on the part of the grantee and grantor in the deed of June 23, 1876.

The defendants allege that the fraudulent intent is obvious from all the circumstances of the case. They say it is proved by the evidence that W. H. Taylor was largely indebted to Brinton at the time he conveyed to his father, and they point to the judgment subsequently entered as the best evidence of the fact. They further allege, as an evidence of his fraudulent purpose that he executed the conveyance a few days before the award of the arbitrators was filed, thus seeking to place his property beyond Brinton's reach; but above all they rely upon the testimony of the witness Fortenbaugh, that Wm. H. Taylor declared to him "that he sold his property to get rid of paying bail money to Brinton"—and further that Fortenbaugh should go to Brinton and procure a settlement of the claim saying, "the way my property now stands I can do no business—I would like to get it back as I had it before." There is no denial of the truth of this evidence—it stands uncontradicted in the case, and it is for you to say whether it satisfies you, that at the time Wm. H. Taylor conveyed the property in controversy to his father, his purpose was to hinder, delay and defraud Joel Brinton in the collection of his debt.

If you shall be of that opinion then your duty will be to inquire further whether Isaac Taylor, the father, was an active participant in the perpetration of this fraud. As I have already said it is not enough that W. H. Taylor was a *fraudulent grantor,* but you must also be satisfied from the evidence that Isaac Taylor was a *fraudulent grantee,* before you can render a verdict for the defendants.

I wish to impress upon you that the fraud of W. H. Taylor is only *one* element, necessary to be established before the defendants can claim your verdict. The *other* is, as I have said, the collusion of the father.

If the case, as to Isaac Taylor, rested simply upon the fect of his relationship to the grantor—upon the occurrences at the time of the execution of the deed and his failure, unaccounted for, to pay the full amount of the purchase money or give security for it, and the various other matters which have been commented upon by counsel—and further upon his supposed insolvency as attested by his effort to borrow money about that time, and his subsequent assignment for the benefit of his creditors, I would, without hesitation say that the evidence fell below the measure of proof necessary to justify a conclusion that the purchase of this property was the result of a fraudulent purpose on the part of Isaac Taylor.

But in addition to the other facts and circumstances in the case, and which it is alleged gives additional force to them, we have the testimony of the witness Byers, that Isaac Taylor said to him in the spring of 1876, "William had got into trouble—that Brinton had sued him on that Kurtz note—that he would find out what he would make out of that—that the longest pole would knock the persimmons."

So far as this language indicates a mere knowledge on the part of Isaac, that his son was being pressed by a creditor, it signifies little or nothing from which fraud could be presumed. If he stood in the position of a creditor, we might understand that it only meant that he would, by superior vigilance, secure his claim; but there is no evidence in the case that the father and son occupied the relation of debtor and creditor.

It is simply the case of a father who, with full knowledge that his son has been sued, declares that the creditor will see what he will make by his suit, "that the longest pole will knock the persimmons;" and shortly after using this equivocal language, and immediately before the suit ripens into a judgment, and without any previous agreement of which we have any evidence, proceeds to purchase the very property the suitor was seeking a lien upon, and by means of that purchase, if it is permitted to stand, prevents the creditor from collecting his debt.

I am asked to say that all this means nothing from which a jury can be permitted to draw an inference of fraud, and that there is nothing to submit to your consideration.

The case has impressed me differently.

If "direct proof" of a fraudulent combination between the grantor and grantee is necessary, then the position is well taken for no such "direct proof" exists in this case. But if fraud may be presumed from facts clearly and distinctly proven, as the soundest authorities declare, then you are entitled to say whether the uncontradicted evidence submitted warrants such a presumption. (10 Harris 183. 2 Norris 182.)

The integrity of this transaction is thus submitted to your consideration and decision.

It is not my purpose to interpret the evidence for you; nor do I desire for one moment, to suggest what meaning you shall attach to it.

It is for you to say whether the purchase was honestly made by the father; if it was, he is entitled to hold the property, and no amount of fraud on the part of his son can vitiate his title.

The purchase upon its face was fair, and nothing short of a clear preponderance of evidence will suffice to justify you in finding otherwise. But if you are satisfied, after considering the facts and circumstances in the case, that father and son were both moved by an iniquitous purpose; that Isaac Taylor bought the property to aid William H. Taylor in cheating his creditor Brinton, then his title is void, and your verdict will be for the defendants.

It is only proper I should instruct you as to the relation of parent and child, which the parties to this alleged fraudulent transaction bear to each other. When this case was before us on a former occasion, I said to the jury, "that fraud is not to be presumed simply because of the relation of father and son—although it is true that transactions of this character are to be more closely scanned when the parties occupy that relation."

In this it seems I was in error. I had certainly understood the doctrine of a bead roll of case to be, that when fraud is alleged, the relation of the parties is a pertinent inquiry. Not of course as indicating fraud apart from other facts, but a circumstance the jury was fairly entitled to consider.

The Supreme Court, however, in this case, speaking of "business dealings between parents and children and other near relatives," takes occasion to say, "they must be treated just as are the transactions between ordinary debtors and creditors.—As in the latter case, were the *bona fides* of such transactions is attacked, the fraud alleged must be clearly and distinctly proved, so likewise in the former." This is the latest utterance of that Court, and of course binding upon us all.

The verdict was for the defendants.—A motion for a new trial was overruled, judgment entered on the verdict, and this writ of error taken.

E. W. Spangler and *Cochran & Hay* for plaintiffs in error.

H. L. Fisher and *W. C. Chapman* for defendants in error.

May 23, 1881. PER CURIAM. This case has been here once before.* We then thought that there was no sufficient evidence of fraud to submit to the jury.—There was additional evidence given at the last trial—sufficient to submit to the jury—of complicity between the grantor and the grantee of the deed of June 23, 1876. Upon such a question, the evidence must necessarily be allowed a wide scope. Any evidence of combination being given, the acts and declarations of both parties are admissible. We find no error in the ruling of the Court admitting evidence, and the case was fairly submitted to the jury in the charge.

Judgment affirmed.

* Reehling, assignee of Taylor, v. Byers, 1 YORK LEGAL RECORD, 53.

YORK LEGAL RECORD.

VOL. II. THURSDAY, JUNE 23, 1881. No. 16.

SUPREME COURT.

Lehr's Appeal.

Petition for review—When it cannot be entertained—Defects in.

A petition for a review of an auditor's report, was presented after the confirmation of the report and the payment of the amounts awarded to the various distributees, and the signing of their discharges for the same. HELD, reversing the Court below, that the petition was filed too late, and could not be entertained.

The petition in this case was defective in that it did not allege that the balance found to be due on the executor's account was not paid over by the accountants.

A petition for review is in the nature of a bill in equity, and must set out all things necessary to give the Court jurisdiction.

BY THE COURT BELOW: The testator in his will devised to his nephew, Adam Lehr, two tracts of land, subject to the payment of one hundred dollars per acre, the second of which containing about sixty-six acres and seventy-seven perches was the one on which he charged for John and his children, the amount mentioned in the auditor's reports and the Court's opinion. He directed his executors to "collect all his property and estate," "and as soon thereafter as it can be most conveniently done to the best advantage to sell and convert the same into money, and to collect from the nephews all that may be then payable of the price of the lands devised to them, and to distribute the whole amongst the children of my deceased brother John, or their descendants in the manner hereinafter directed." After providing for the children of Lucinda Hoff, a deceased daughter of his brother John, by directing that the sum of twenty-one hundred dollars should be taken out of the money charged on his land, and specially ordering how it should be divided among them, and if all should die under 21 years of age, and without issue, the sum so retained for them should immediately go to such of the children of his said brother John, or their descendants, as may then be living, in the manner and proportions thereinafter directed, as to the residue of said remainder. Then he added: "All the residue of said remainder shall go to the rest of the children of my said brother John, or their descendants *per stirpes* and not *per capita*, however remote in degree, who may be living at the termination of the aforesaid life estate, excluding the descendants of Lucinda Hoff, who are fully provided for." Then he directs the shares of Mrs. Martin and Julia Bower, daughters of John, to be retained, and the interest paid to them during life. He follows that up immediately with a direction that the shares of the Hoff children and Mrs. Martin and Mrs. Bower shall remain charged with their interest, on the three devises of his real estate (two to Adam and one to Charles Lehr, nephews), until paid according to his will. Then follows this provision: "Regarding the second devise to my nephew, Adam Lehr, of the sixty-six acres and seventy-seven perches, *and my nephew, John Lehr, his brother*, I do hereby give and bequeath, order and direct as follows—that is to say, after deducting from the amount of the valuation I have put upon the lands embraced in that devise the aggregate of the sum of money already charged on said lands, the said Adam shall pay annually unto his said brother John, during his life time, the interest on the residue of said valuation, at six per cent. per annum, and at the death of said John shall pay the principal of said residue unto the children of said John, or their descendants living at his death, and if there be none such, then the principal to go to the descendants of my brother John then living, excluding the descendants of Lucinda Hoff, and be distributed in their case in the manner hereinbefore directed as to the remainder of my estate." HELD, that John was entitled to a full share absolutely of all the other part of the testator's entire estate, in addition to the amount charged on Adam's tract No. 2.

Appeal from the decree of the Orphans' Court of York county.

The facts in this case are as follows:

Philip Lehr, a farmer residing a few miles north of the Borough of York, made his will May 15, 1860, which, after his death, was duly admitted to probate the 7th day of August, 1865, by the Register of Wills for York County and letters testamentary were, on the same day, granted thereon to Adam Lehr and Daniel Heckert, the executors named therein. The executors filed their administration account in the Register's office July 27, 1867, which was presented to, and confirmed by the Orphans' Court, by which an auditor was appointed September 18, 1866, to distribute the balance on the account. The auditor filed his report, in Court Nov. 22, 1866, and the report, which under the rules of Court was open to exception for three weeks, became at the end of that time absolutely confirmed, without objection or exception. The executor, thereafter, on the 20th day of December, 1866, paid to the legatees of the testator the amounts awarded to them by said report, and took their releases for those amounts, which were duly recorded. Thus matters stood until May 30, 1867, when John Lehr, one of the legatees, filed a petition in the Orphans' Court of York County, in which he complained that there was error in the report of the amount awarded to him, and asked the Court to recommit the report to the auditor for review, and the Court granted a rule to show cause why the confirmation of the report should not be opened, &c. On the second day of September, 1867, Adam Lehr, both an executor and legatee, whose interests were affected by the proceeding, and Daniel Heckert, his co-executor, filed an answer in which they denied, among other things, that there was error in the auditor's report, as alleged by the petitioner, and stated that the report had been absolutely confirmed without objection, and that they had paid out the money awarded to the legatees and received their releases. John having set

up, by way of excuse or explanation, for his tardiness in filing his petition, that Adam had dissuaded him from appearing before the auditor, told him that all would be right, and that he (John) resided in Dauphin county, 30 miles above Harrisburg, while the proceedings in distribution were going on, Adam, in the answer, denied that he had dissuaded John from appearing before the auditor, and told him that all would be right, and also averred that he had told the petitioner, and the other legatees, before he had made settlement with them, or paid out any of the money awarded to them, that they should go and look for themselves, and that the petitioner had been in York October 6 and November 25, 1866, and was residing near York on and after December 12, 1866, before the report of the auditor had been absolutely confirmed.

On the 7th day of July, A. D. 1868, the Orphans' Court recommitted the report a distribution conformably to the views expressed in its annexed opinion (hereinafter printed) which views were as follows: "As regards the construction given by the auditor to the devise to John Lehr, in the will of Philip Lehr, we think he was in error. We think, that in addition to the life interest in the proceeds of a portion of the valuation of the tract containing sixty-six acres and seventy-seven perches, devised to Adam Lehr, he is entitled to a full share of all the remainder of the estate."

In compliance with the directions of the Court, the auditor proceeded to rehear the matter, and on the 9th day of December, 1868, filed his amended report, in which, in accordance with the instructions given to him by the court, he awarded that John Lehr should not only receive the interest during life, of the amount directed to be charged on tract No. 2, devised to Adam Lehr, and his children should receive the principal thereof, at his death, but also that John should receive a full share with the other legatees, of the remainder of the testator's estate. Exceptions were filed to this report on behalf of Adam Lehr, and other legatees, the first of which was in substance that the Court had no jurisdiction to make the said order and decree of July 7, 1868, and to order the auditor to rehear his former report, and report a distribution in conformity with the views of the Court contained in said decree. Secondly, that said distribution was erroneous and not in conformity to the provisions of the last will and testament of Philip Lehr, deceased, and thirdly, that the distribution was erroneous and with legal authority in requiring Adam Lehr to refund and pay over to John Lehr, or his assigns, the sum of $456.-45½, and also to pay over to John Lehr, or his assigns, on behalf of Julia Bower, the sum of $218.80, and on behalf of Susan Martin, the like sum of $218.80. On the 27th day of March, A. D. 1881, the exceptions were dismissed and report confirmed by the Court. From this decree the present appeal is taken.

[The provisions of the will are given in the fourth syllabus, and need not be repeated here.]

The opinion of the Court below, FISHER, P. J., in opening the first report, is as follows:

The petitioner claims a rehearing on two grounds. The first is that the sum of three hundred dollars given to him by the testator in his life time, was not allowed to petitioner by the auditor.

Secondly, because the right of the petitioner to a portion of the residue of the estate, was disregarded by the auditor in his report.

As regards the *three hundred dollars,* we think the petitioner has no right to the money claimed. That it was intended for him originally, there can be no doubt; for the evidence is it was a gift *inter vivos* and not delivered to petitioner, but to another person for his use, and was afterwards recalled or revoked.

To make it good, there must have been an actual delivery to the beneficiary, and

until delivered the donor had the right to recall it. This doctrine is too well established in this State to need any citation of authorities to sustain it.

As regards the construction given by the auditor to the devise to John Lehr, in the will of Philip Lehr, we think he was in error. We think, that in addition to the life interest in the proceeds of a portion of the valuation of the tract containing sixty-six acres and seventy-seven perches, devised to Adam Lehr, he is entitled to a full share of all the remainder of the estate.

By the will John Lehr was made a residuary legatee by force of the words, "to distribute the whole amongst the children of my deceased brother John, or their descendants, in the manner hereinafter directed," and then *inter alia,* he directed that "all the residue shall go to the children of my said brother John, or their descendants, *per stirpes* and not *per capita,* however remote in degree, who may be living at the termination of the aforesaid life estate."

Thus the testator made a complete disposition of all his estate except the residue to be paid out of the sixty-six acres and seventy-seven perches; that he gives to petitioner. The construction given to the will by the auditor, gives him only a life estate in the residue of this share, nothing more.

We think him entitled to this in addition to a full share of the other property as one of the residuary legatees.

The difficulty about this matter is not in the construction of the will, but arises from the fact that the executors have paid out the funds in their hands, according to the decree of distribution reported by the auditor, and confirmed by the court.

Should this court not be able for this reason to correct the report of the auditors, in our opinion great injustice will be done to petitioner.

If any way can be devised that will do justice between the parties and not prejudice the executors, it ought to be adopted. We have therefore come to the conclusion to recommit the report of the auditor, with directions to report a distribution according to the views of the Court, expressed in this opinion.

To the end that all persons interested may be made parties to the proceedings, we will also direct that the auditor issue his citation commanding all parties interested in this matter to appear before him at a certain time and place to be fixed by him, and to become parties to this proceeding if they think proper, and when and where he will rehear this distribution.

After the report is made, we will allow any persons interested to file exceptions to the same. If confirmed we will award restitution by the executors, of the part improperly awarded to them and will direct that restitution be made by each of the other legatees of the amounts improperly awarded to them, and if not refunded will issue attachments or executions to enforce the decree.

By this method we think justice may be done to John Lehr, the petitioner, without doing injury to the executors. If we have erred in opening the decree, the parties interested may appeal to the Supreme Court, which will review our decree.

Cochran & Hay for appellant.

The law, in doubtful cases, leans in favor of a distribution as nearly conformable to the general rules of inheritance as possible:

Amelia Smith's Appeal, 11 Harris 9.

The presumption is in favor of equity in the distribution:

Weber's Appeal, 5 Harris 474.

Final decrees may be corrected, *if nothing has been done under the decree to prevent it:*

Bishop's Appeal, 2 Casey 470.

A petition for review under the act of 1840 must allege that the balance found due by the decree was not paid over by the accountant:

Russell's Appeal, 10 Casey 269.

W. C. Chapman for appellee.

When two distinct gifts of different

amounts are given by the same will, with nothing more to explain them, both gifts shall take effect.

Where both gifts are not *ejusdem generis,* the one is not merged in the other, but the latter shall be regarded as cumulative:

2 Williams on Executors, 1160-2 Edi. 1859.
2 Rop. on Leg. 24, Sec. 111.
Yorkney v. Hansard, 3 Hare 621.
Curry *v.* Pile, 2 Bro. C. C. 225.

The appellant's own authorities show that the Court below had the power to open the decree and grant a rehearing.

June 15, 1881. GORDON, J. The executors of Philip Lehr's estate filed account, in the register's office of York County, on the 27th of July, 1866, which was duly presented to the Orphans' Court and confirmed. An auditor was appointed, September 18, 1866, to distribute the balance of money found to be in their hands. On the 22nd of the succeeding November the auditor filed his report, which was, so far as appears by the record, confirmed without opposition, and in December following, the executors distributed the money in their hands to the legatees as directed by the decree of the Court. Thus was the matter fully closed up in regular order in accordance with the terms and conditions prescribed by the Act of Assembly.

Then on the 9th of May, 1867, we have the petition of John Lehr, the appellee, for a review of the previous proceedings, on the ground that the auditor had misconstrued the will of Philip Lehr, and that, he, the petitioner, had not received as much of the estate as lawfully belongd to him. This petition was entertained by the Court, which, after reviewing the former report, came to the conclusion that it was wrong and referred it back to the auditor with directions to rehear the parties, and make distribution according to the principles expressed in the opinion of the learned Judge who delivered it. On the 9th of December this second report of the auditor was filed, and upon it the decree was rendered which is the subject of the present appeal.

Now it may be that the interpretation of Philip Lehr's will, put upon it by the learned Judge of the Orphans' Court, was the right one, and that the appellant, had he presented his claim in time, would have been entitled to the full amount awarded to him by the Court's decree. This, however, is a matter, which we do not propose to discuss, since the discussion would be fruitless. The appellee's petition for a review came too late, and it was in itself totally defective—hence, it ought not to have been entertained. This proceeding is under the Act of 13th of October, 1840, which provides for petitions of review, and gives the judges of the Orphans' Court, power to open their decrees of confirmation, and to re-examine the accounts of executors, administrators and guardians. But the proviso to that Act expressly stipulates that its provisions shall not extend to any case where the balance found due shall have been actually paid and discharged.

As in the case in hand, distribution had been made by the executors to the parties entitled under the original decree, it is very clear, if we are to be governed by the statute, that the Court had no jurisdiction to entertain the petition —hence its decree thereon was void and of no effect.

Moreover, the petition is defective in this that it did not allege that the balance found to be due was not paid over by the accountants. The petition is in the nature of a bill in equity, and must set out all things necessary to give the Court jurisdiction; here, however, the one thing of others, necessary to give the Court jurisdiction is omitted. This was of itself, fatal to the plaintiff's case, and his petition for this reason, were there none other, ought to have been refused; Russell's Administrators' Appeal, 10 Casey 258.

The decree of the Court below is now reversed and set aside, and the petition of the plaintiff dismissed at the cost of the appellee.

YORK LEGAL RECORD.

VOL. II. THURSDAY, JUNE 30, 1881. No. 17.

SUPREME COURT.

Road in Heidelberg Township.

Road law—Power of re-viewers to amend report.

The reviewers in their report having failed to state whether they had endeavored to obtain releases for any damages occasioned by the proposed opening of the road, the report was re-committed to them with instructions to comply with the provisions of the third section of the Act of 17 February, 1860, and report their proceedings to the Court. In this second report they stated that they "gave notice of the time and place of meeting," and proceeded to award damages. HELD, affirming the Court below, that the Court had the power to re-commit the report to the re-viewers for that purpose, and that such proceedings did not constitute an *alias* view.

Certiorari to the Court of Quarter Sessions of York County.

The report of the viewers appointed to view and lay out the road in controversy in this case, was set aside, owing to misdescription of the termini. A petition for review was then presented, and an order of review granted. In their report, the reviewers failed to state whether or not they had considered the question of damages, and endeavored to obtain releases therefore. To this report the following exceptions were filed:

1st. The record does not show that any petition was ever presented to the Court of Quarter Sessions of the Peace of York county, praying for an order to review, as stated in the order.

2nd. There having been no petition presented to the Quarter Sessions Court for an order to review, the Court had no jurisdiction to grant the order of review, and all the proceedings under said order, as well as the order itself, are illegal, irregular and void.

3rd. The viewers have not considered the question of damages as imposed upon them by the order of Court and the Act of Assembly.

4th. The report of viewers does not show that the viewers made any effort to obtain releases for damages claimed, or that any one claimed damages, or otherwise.

On represenation by counsel for the road that the words "Orphans' Court" in the heading of the petition was a *lapsus penna,* the petition was allowed to be amended. The counsel for the exceptant then filed the following motion:

And now to wit, February 21, 1880, Blackford & Stewart, attorneys for exceptant, respectfully move the Court to recommit the report above mentioned to the reviewers for amendment according to the terms of the 10th Section of the Act of 17th February, A. D. 1860, entitled "An Act relating to Roads and Brides in the County of York.

The following opinion and decree was afterward made by the Court, FISHER, P. J.:

In this case exceptions were filed to the report of the reviewers. On the argument of the case the counsel for the road asked the Court to amend the petition, *nunc pro tunc,* as he had inadvertently addressed the petition to the Orphans' Court, instead of the Court of Quarter Sessions, and made affidavit to that effect of that mistake. The petition was actually filed in the Court of Quarter Sessions, the reviewers appointed by the same Court and the report was there presented and filed. We think the amendment ought to be allowed, and direct the words Orphans' Court to be stricken from the petition, and the words Quarter Sessions be used instead of said words Orphans' Court.—But no erasures or interlineations are to be made on the petition, but the order of the Court be written by the clerk on the back of the petition, and on the motion and on the minutes of the Court.

At the same argument a motion was made by the exceptants to have the proceedings recommitted to the reviewers, to enable them to amend their report by showing their non-compliance or compliance with the 3d Section of Act of 17th of February, 1860. We think this ought to be done, as the reviewers did

not assess any damages, and that the parties interested may possibly have been entitled to them, had they had a proper opportunity to have the question decided by the reviewers.

And now to wit, May 24th, 1880, the report recommitted to the reviewers with directions to comply with the provisions of the 3rd Section of the Act of 17th February, 1860, and report their proceedings to the Court.

Under this order, the reviewers reported in substance as follows:

That they were all duly sworn or affirmed according to law, that due and legal notice of the time and place of their meeting for the purpose of performing their duties under the above order of the Court was given, and that the land owners through whose premises the proposed road passes, were all duly notified thereof; that in accordance with the provisions of the said third section of the Act of Assembly, they endeavored to obtain releases of damages from the persons through whose lands said road would pass, and that Susan Forry "late Susan Miller," Henry L. Bowman, Samuel Bowman, Andrew Rudisill, and William Haffer refused to release their claims to damages, and David Becker, William Bittinger and William Flickinger were not present at the view; that thereupon the said reviewers proceeded to assess the said damages so refused to be released, and did assess the same, taking into view the advantages as well as the disadvantages arising from the location of said road, as follows, viz: Susan Forry, thirteen dollars and thirty-three cents. Henry L. Bowman, twenty, Samuel Bowman, twenty dollars, Andrew Rudisill, thirteen dollars and thirty-three cents, David Becker, five dollars, Haffer and Bittinger, eighty dollars, and Haffer and Flickinger, twenty-six dollars and sixty-seven cents, and the other land owners through which said road passes are petitioners, and therefore not entitled to any damages.

And they further report that they make this report to said Court as an amendment to their report filed in said Court June 16th, 1879, and that the said road is of such public utility that the damages should be paid by the county.

To this report the following exceptions were filed:

1st. The said Henry L. Bowman renews and insists upon all the exceptions filed by him to the said first report.

2nd. The Court had no power to direct the viewers to perform the acts and things which they have done and performed as shown by said amended report and therefore said amended report is illegal, void and a nullity.

3rd. The Court had no power to direct the report to be recommitted to the viewers "with directions to comply with the provisions of the 3d Section of the Act of 17th of February, 1860, and report their proceedings to the Court," and therefore the proceedings under said order are void and illegal.

4th. The effect of the said order of the Court was to grant an alias view, which is expressly forbidden by the Act of Assembly.

5. The whole proceeding is grossly illegal, irregular and unauthorized.

The exceptions, after argument and reargument, were dismissed and the report confirmed, whereupon the present writ of certiorari was taken.

Blackford & Stewart for appellant.

The reviewers did not consider the question of damages, nor endeavor to obtain releases therefor, as imposed upon them by the order of Court, and the Act of Assembly. This was an unquestionable part of their duty:

Act 17th February, 1860, P. L. 62, Section 3d.

It was as much a part of their duty to obtain releases for damages or assess the same as it was to lay out the road:

Baldwin and Snowden Road, 3d Gr. 62.

A report of viewers was fatally defective for the reason that the viewers

had not considered the question of damages nor obtained releases:

Road in Cogan House Township, 7 W. N. C. 257.

The Court was asked to recommit the report for *amendment*, according to the terms of the *tenth* section of the Act of 17th February, 1860, instead of which they were directed to comply with the provisions of the *third* section of the same act, and report their proceedings to the Court. This the Court had no power to do.

The proceedings were in effect an *alias* view, which is expressly forbidden:

Act 17 February, 1860, Sec. 10 P. L. 63.

S. H. Forry and W. C. Chapman for appellee.

The viewers said in their report that they did "not find any land owners over which said road is laid out are entitled to damages by laying out said road." This shows that they *did* consider the question of damages, and hence the cases cited by the appellant on that subject are not applicable.

The real ground of complaint of the appellant in this case is that he was not allowed sufficient damages. His remedy for this was by an application for a rereview, not by the exception to the report of the reviewers:

Road in Chartier's Township, 10 Casey 413.

The Court of Quarter Sessions had the power to recommit the report to the reviewers for amendment:

Act 17 February, 1860, Sec. 10.

This is also the practice under the general road law of 1836:

Potts' Appeal, 3 Harris 414.
New Hanover Road, 6 Harris 220.

Even if these proceedings under the second order constituted an *alias* review, such a review can be held:

Act 23 February 1870, P. L. 228.

May 16, 1881. PER CURIAM. We cannot doubt the power of the Court to recommit the report to the reviewers for amendment, and if, as it would seem, this was done on the motion of the exceptant it does not lie in his mouth to complain of the recommitment. This effect certainly was not an *alias* view—and the reviewers had a right to correct their former report on the subject of damages—which was what the exceptant asked for.

COMMON PLEAS.

C. P. of Schuylkill Co.

Burns v. Commonwealth.

A druggist who sells patent medicine is obliged to pay the license fee, in addition to that paid by him as a druggist.

Appeal from the decision of the Mercantile Appraiser.

PERSHING, P. J. The appeal in this case sets forth that J. Kellar Burns, the appellant, is appraised and assessed $5 for the sale of patent medicines; that he is a regular apothecary at Minersville, and retails patent medicines out of his store as is done by all the apothecaries and druggists in Schuylkill county and the State. He denies that the sale of patent medicines made him liable to pay a license fee to the Commonwealth in addition to that paid by him in pursuit of his business as apothecary and druggist. By the provisions of the Act of 10 April, 1849, (Purd. Dig. 1129, pl. 1 and 2), vendors of merchandise who sold patent medicine were required to take out a separate license for the right to sell such medicines, the fee for which was based on the amount of sales, the lowest being $5. From the payment of this license the Act excepted "regular apothecaries for the sale of simple medicines, the prescriptions of physicians and the compounds of the pharmacopœia."—This Act of 1849 is entitled "an Act to create a sinking fund, and to provide for the gradual and certain extinguishment of the debt of the Commonwealth." The Act of 22d April, 1858, (P. L. 468), is entitled "an Act to establish a sinking fund for the payment of the public debt," and provides in its ninth section (not given in Purdon's Digest), "that

the sinking fund Act of 1849, and all laws inconsistent herewith are hereby repealed." This would be decisive in favor of the appellant were it not for the fact that the first section of this same Act specifically appropriates to the sinking fund the revenue from "patent medicine licenses." This confusing legislation has proven troublesome to the Courts. This same question of the liability of a druggist to pay this patent medicine license was before this Court on appeal in 1879, and was then decided in favor of the Commonwealth, notwithstanding our attention was specially called to a decision made previously by the Courts of Allegheny county, Pennsylvania, in which the assessment of this tax was set aside on the ground that the Act of 1849 was repealed by the Act of 1858. The same conclusion, it appears, was reached by the Recorder of Philadelphia, in the Commonwealth *v.* Mitchell. Who shall decide when doctors disagree? is a question that yet awaits an answer. Fortunately when Judges disagree the Supreme Court can be invited to settle the controversy. The precise question now before us was decided by Judge Pearson in the Court of Common Pleas of Dauphin county in favor of the Commonwealth, on the appeal of Gross & Son. The Supreme Court affirmed this ruling in an elaborate opinion by Justice Gordon, filed June 21, 1880. A reargument was awarded, which was heard at the present term at Harrisburg, and on May 31, 1881, the Supreme Court ordered that the judgment entered on the first argument should stand. (See Gross *v.* Commonwealth, May T., 1880, not yet reported). It follows from this that if the license now paid by druggists is oppressive, an appeal for relief must hereafter be made to the legislative instead of the judicial branch of the State government. Appeal dismissed at the costs of the appellant.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Sheriff—Return of writ—Jurisdiction.—Judgment was obtained in the Court of Common Pleas No. 1, of Philadelphia county, against a corporation having its principal office in that city. A *testatum* writ of execution issued against lands of defendant, in Westmoreland county.—Upon a conflict of jurisdiction arising between the Courts of Common Pleas of Philadelphia and Westmoreland county, over the fund derived from the sale under the writ: HELD, that the sheriff to whom a *testatum* writ of execution is delivered under the Act of June 16, 1836, must be ruled by the court out of which process issued to return the writ, before proceedings in the nature of an attachment against him specified by said act can be begun—Application by the sheriff to the court of the *situs* to take the acknowledgment of the sheriff's deed after a sale, is a condition precedent to the vesting of any power in that court, but having thus acquired jurisdiction by virtue of the sheriff's application, it may proceed to inquire into the validity of the sale, etc. The authority given by the act to the court of the *situs*, does not in the least depend upon the permission of the court whence the writ issued, or the consent of the parties in interest. The discretion to acknowledge the deed in the court of the *situs*, and to pay the fund therein, lies entirely with the sheriff, and his exercise of it enables the court of the *situs* to inquire into the validity of the sale and distribute the fund.—The sheriff is in no default if he defers making his return into the court whence the writ issues, until his deed has been acknowledged in the court of the *situs*.—*Borlin's Appeal*, 11 Pittsburgh Legal Journal 412.

To call a North Carolina judge "a poverty stricken wretch," involves a suit of $20,000.

YORK LEGAL RECORD.

VOL. II. THURSDAY, JULY 7, 1881. No. 18.

SUPREME COURT.

Kister v. Reeser.

Deed—Construction of—Reservation or exception.

The clause of the deed in dispute is as follows: "This is part of a large tract of land of the said William Reeser, in Newberry township, the said William Reeser doth reserve a road ten feet wide along the line of Joseph Burger, to be shut at each end with a bar or gate." HELD, reversing the Court below, that this clause was a reservation only, and would not sustain a claim to a right of way after the death of the grantor.

The word "road" in this clause means the reservation of a way.

A reservation is the creation of a right or interest which had no prior existence as such in a thing or part of a thing granted, and is distinguished from an exception in that it is of a new right or interest.

An exception is always of part of the thing granted, it is of the whole of the part excepted.

Writ of error to the Court of Common Pleas of York County.

On the 13th of September, A. D. 1865, William Reeser, of Newberry township, in the County of York, Pa., was the owner in fee of a tract of land, situate in said Newberry township, and on the day and year aforesaid, joined by his wife Elizabeth, by Deed granted and conveyed unto Henry H. Drorbaugh, his heirs and assigns, nineteen acres and thirty-five perches of said tract of land. This deed of conveyance contained the following words: "This is part of a large tract of land of the said William Reeser, in Newberry township, the said Wm. Reeser doth Reserve a road ten feet wide along the line of Joseph Burger, to be shut at each end with a bar or gate." On the 13th day of November, A. D. 1867, said Henry H. Drorbaugh, and Sarah, his wife, by their deed duly executed, granted and conveyed said 19 acres and 35 perches of land to Isaac Frazer, his heirs and assigns. "This being the same tract of land that William Reeser deeded to Henry H. Drorbaugh by deed dated the 30th day of September, A. D. One Thousand Eight Hundred and Sixty-Five, wherein said Wm. Reeser Reserves a road ten feet in width along the line of Joseph Burger's land, to be shut at each end with a bar or gate."

On the 9th of December, A. D. 1867, Isaac Frazer and wife, by their Deed, duly executed, granted and conveyed the same tract of land to Isaac Kister, the Plaintiff in Error, his heirs and assigns. "This being the same tract of land that William Reeser deeded to Henry H. Drorbaugh by deed dated the 30th day of September, A. D. One Thousand Eight Hundred and Sixty-Five, wherein said William Reeser reserves a road ten feet in width along the line of Joseph Burger's land, to be closed at each end with a bar or gate."

Isaac Kister, the Plaintiff in Error, went into the possession of said tract of land shortly after the delivery of the Deed to him in 1867, and has remained in possession since said time.

William Reeser died in March, A. D. 1862.

William Reeser's rights under the reservation were not questioned during his lifetime.

George Reeser, Sr., one of the Defendants, became the owner of a portion of the remainder of the tract of Wm. Reeser, by deed from his father, William Reeser, dated the 3rd day of March, A. D. 1872, and continues to own the same and claims under the reservation in the Deed of said Wm. Reeser to Henry H. Drorbaugh, the use of a ten feet wide way over the land of Isaac Kister, the Plaintiff in Error, along the line of Joseph Burger. No mention of the privilege of any road is given or granted in Deed from William Reeser to said George Reeser.

A few days before the day of April, A. D. 1880, Isaac Kister, the plaintiff, placed a permanent fence at each end of the line of reservation mentioned in the deed of Wm. Reeser to Drorbaugh.

On the 27th day of April, 1880, the defendants in error and defendants be-

low pried up and broke down said fences of the plaintiff and entered upon his lands and drove a wagon and team across the same; and for this trespass this suit is brought to recover damages. To avoid controversy and save time on the trial of the case the damages were agreed upon by the parties to be $4.00.

The following points were submitted to the Court below, by the plaintiff:

1. That if the jury believe from the evidence that there was no road in existence over the Plaintiff's close, along the Burger line, where the road is now claimed under the reservation in the deed from Reeser to Drorbaugh, at the time when said deed was executed, then the reservation in said deed does not extend beyond the life of William Reeser, deceased, and ceased and determined with his death on the day of March, A. D. 1872, and the defendants have not justified the trespass proven in this case; and the plaintiff is entitled to recover.

2. That if the jury believe that the defendants, or any of them, did drive over the close now owned by the plaintiff, before the execution of the deed from Reeser to Drorbaugh, while the 19 acre lot and the land of the defendant, George Reeser, Sr., was owned by Wm. Reeser, Sr., a few times a year to haul wood from other land of said William Reeser, Sr., such occasional use would not establish such a road as the defendants could use after the death of William Reeser, Sr., or which will justify their entry on the land of the plaintiff under the reservation in the deed aforesaid, and the plaintiff is entitled to recover for the trespass proven in this case.

3. If the jury believe the trespass complained of was committed then the words of the reservation in the deed from Reeser to Drorbaugh do not justify said trespass, if said William Reeser, the grantor, had died prior to the committing of said trespass.

These points were answered in the negative.

The defendants submitted the following points:

1. That the rights of the parties in this case depend upon the true intent and meaning of the deed of Wm. Reeser, Sr., to Henry H. Drorbaugh, dated September 30th, 1865; that the reservation, by the grantor therein of a road ten feet wide, operated, by way of exception, to take out of the grant a portion of the land ten feet wide, along the line of Joseph Burger, for a road, and runs with the land and inures to the benefit of the assigns of said grantor, although they are not named in the reservation.

2. That under the legal effect of the reservation in said deed, the portion of land ten feet wide along the line of Joseph Burger, for the use of a road, is excepted out of the grant, and remained as it was before for the purpose of a road: that the evident purpose of said reservation was to furnish egress and regress from the other lands of the grantor to and from the public road leading to Goldsboro', and the defendant being the owner of those other lands, had a legal right to pass in and out to said public road, over the said land reserved in said deed, and committed no trespass in doing so.

3. That upon the law and evidence in this case the plaintiff is not entitled to recover.

To which the Court made the following answers:

1. The rights of the parties in this case depend upon the proper construction of the reservation in the deed of William Reeser, Sr., and wife, to Henry H. Drorbaugh, dated September 30th, 1865. That reservation is a general one, and inures to the benefit of the defendant as owner of a portion of the land conveyed by Reeser and wife to Drorbaugh.

2. That under the reservation in the deed of William Reeser and wife to Henry H. Drorbaugh for 19 acres and 35 perches, dated September 30th, 1865, the defendant had a legal right to pass

over the road reserved in said deed, and did not commit a trespass in entering as he did the premises of the plaintiff.

3. The Court read the defendant's third point and answered it in the affirmative.

The Court below, FISHER, P. J., delivered no charge to the jury, excepting the above answers, and instructed them to find for the defendants.

The Court's answers, the admission in evidence of the deeds from the original grantor to the grantors of the present defendants, and the instruction to the jury to find for the defendants, were assigned as error on the part of the Court below.

John W. Bittenger and V. K. Keesey for plaintiff in error.

A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c., doth reserve some new thing to himself out of that which he granted before:

See Whitaker *v.* Brown, 10 Wright, 197.

It is a universal rule of construction that "a deed or grant must be most strongly construed against the grantor. This applies with special force to a restriction in a deed whereby there is a withholding of something from a grant":

Klaer *v.* Ridgeway, 5 Norris 529-534.

Every exception or uncertainty in a deed is to be taken favorable to the grantee:

Jackson *v.* Buller, 8 Johns, 394.

"An exception is ever a part of a thing granted and of a thing *in esse* at the time":

Whitaker *v.* Brown, 10 Wright 197, 198.

In an exception no words of perpetuity are necessary, for the manifest reason, that the portion excepted has not passed to the grantee, and is held by the same title and estate by the grantor that he had and held in the same. In a reservation the rule is different as words of perpetuity are necessary if it is intended to continue longer than the life of the grantors and so expressly ruled in Ohio in Hays *v.* Storrs, Wright (Ohio) 711, and so held in New York in Hornbeck *v.* Westbrook, 9 Johns. 75, and we submit also in Whitaker *v.* Brown, 10 Wright 197.

W. C. Chapman for defendants.

The reservation is contained in the plaintiff's deed, so that he cannot complain of any hardship in this matter.

A reservation sometimes hath the force of a saving or excepting:

2 Thomas' Coke Litt. *412.

Technical words of reservation may and do operate by way of exception:

Whitaker *v.* Brown, 10 Wright, 298.

The figure of speech known to rhetoricians as *metonymy*, by which one thing is put for another, is one of almost universal use:

Campbell's Philosophy of Rhetoric, 291.

Hence, to reserve a *road* ten feet wide means, in plain speech, to reserve *land* for a road ten feet wide, because the land is the subject to which the description applies.

It is certainly true that a thing reserved remains as it was. A reservation, operating as it does by exception, keeps the thing from passing just as if there was no grant at all:

Schreubeyer *v.* Lyon, 7 W. & S. 184.

The rule of construction contended for by the plaintiff only applies when the language of a deed is *doubtful:*

Richardson *v.* Clements, 8 Norris 503.

It is the duty of the Courts to interpret the language of written instruments, but in doing this they always follow the meaning attributed to terms by those whose custom it is to use them:

Gas' Appeal, 23 P. F. Smith 46.

They ought to be construed according to the meaning and understanding which the parties themselves had of them, at the time they were made and entered into:

Gibson *v.* Lyons, 5 Watts, 41.
Carter *v.* Hilty, 2 Harris 289.

June 25, 1881. TRUNKEY, J. William Reeser, by deed dated September 13,

1865, conveyed to Drorbaugh part of a tract of land which he then owned, and Drorbaugh's title has been vested in the plaintiff. The deed contains this clause: "The said William Reeser doth reserve a road ten feet wide along the line of Joseph Burger, to be shut at each end with a bar or gate." Prior to the conveyance there was neither a public nor private road over the land. The owner in fee of land may travel over it when and where he pleases, and it would be vain to speak of his right of way within his lines. William Reeser died in 1872. The Court properly treated the question as one of law; for, aside from the conceded facts, there was no evidence to affect the construction of the deed or clause of reservation. If that clause is an exception of land ten feet wide next to Burger's line, the plaintiff was not entitled to recover. But if it is a reservation of a way over said land, the defendants were trespassers.

The land was granted in fee and a road reserved next Burger's line. This was to be shut at each end, and subject to the grantor's use for a road, the grantee could enjoy it, for all purposes. The word road has never been defined to mean land; it is difficult to find a definition which does not include the sense of way, though the latter word is more generic, referring to many things besides roads. Road is generally applied to highway, street, or lane, often to a passway or private way, yet strictly it means only one particular kind of way. Its sense in this deed is very clear. Taking the entire clause, with reference to the grant, it means the reservation of a way. This is as plain as if the word way were in place of road. Lawyer and layman alike would understand the word road in this clause in the same sense as it is used in the statute providing for grants of "private roads." A private road obtained by proceedings under those statutes is a mere way, the owner of the way having no interest in the land.

A private way is an incorporeal hereditament of a deal nature, entirely different from common highway; it is "the right of going over another man's ground."

Where land is granted and the right of way is reserved that right becomes a new thing, derived from the land; and although before the deed, the grantor had the right of way over the land whenever he chose to exercise it, yet when he conveyed the land the reservation was a thing separated from the right of the grantee in the land; State *v.* Wilson, 46 Maine 9. A reservation is the creation of a right or interest which had no prior existence as such in a thing or part of a thing granted. It is distinguished from an exception in that it is of a new right or interest. An exception is always part of the thing granted, it is of the whole of the part excepted. A reservation may be of a right or interest in the particular part which it effects. These terms are often used in the same sense, the technical distinction being disregarded. Though apt words of reservation be used they will be construed as an exception, if such was the design of the parties. Thus, when a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon road to haul the coal therefrom as wanted," it was held that the saving clause operated as an exception of the coal. The coal was land and the reservation of that part of the land excepted it from the grant. It was a thing corporate, existed when the grant was made, and differed from something newly created, as a rent or other interest strictly incorporeal; Whitaker *v.* Brown, 10 Wright 197.

Here, the saving clause created the way over part of the land granted, a right strictly incorporeal, and is not an exception of part of the land contained in the grant.

Judgment reversed and *venire facias de novo* awarded.

YORK LEGAL RECORD.

VOL. II. THURSDAY, JULY 14, 1881. No. 19.

SUPREME COURT.

Peeling's Appeal.

Sheriff—Interest of.

The Court below, after confirmation, payment of the purchase money and delivery of the deed, having set aside the Sheriff's sale of defendant's property, upon application made by the purchaser, who was also the plaintiff in the execution, setting forth that he purchased under a misapprehension as to the application of the purchase money, and the title passed by the sale, the Sheriff appealed from the Court's decree, ordering the deed to be canceled, the money refunded, and the sale set aside. HELD, that the Sheriff had no interest which entitled him to appeal.

Appeal from the decree of the Court of Common Pleas of York County.

The following are the facts of the case as taken from the paper book of the appellant.

On the 8th day of April, 1875, Jere Carl entered a judgment against Henry Strine and Jacob Strine, in the Court of Common Pleas of York county, to January Term, 1875, No. 992, for the sum of $650.00, with interest from the 8th day of December, 1875. On said judgment a writ of *fieri facias* was issued on the 12th day of March, 1880, and the real estate of Jacob Strine, one of the defendants, was levied upon on the said 12th day of March, 1880. The Sheriff held an inquest on the 3rd day of April, 1880, and the real estate was condemned; and the inquisition approved by the Court, April 10, 1880. Writ of *venditioni exponas* was issued on the 13th April, 1880, and the property levied upon said writ of *fi. fa.* was sold June 5, 1880, to Jere Carl, for the sum of $600.00, and the Sheriff, James Peeling, made return to said writ of *venditioni exponas,* that he had sold the property to said Jere Carl for said sum of $600.00.

The sheriff executed a sheriff's deed dated the 14th day of June, 1880, in the usual form, conveying the property to said Jere Carl, the purchaser, his heirs and assigns, which deed was duly acknowledged in open Court on the said 14th day of June, 1880, in pursuance of previous proclamation. On the 15th day of June, 1880, James Peeling, sheriff, delivered to Jere Carl, the purchaser, the deed for said premises, and said Carl handed the sheriff a check on Weiser, Son & Carl, bearing date June 15th, 1880, for $602.75 for the purchase money and $2.75 for sheriff's deed. The same day that the sheriff's deed was delivered to Mr. Carl, and before the check was presented at the Banking House of Weiser, Son & Carl, for payment, it was discovered that the lien of the judgment (upon which the process had been issued and the real estate sold, as hereinbefore mentioned) had expired on the 8th day of April, 1880, which was after the *fieri facias* had been returned by the sheriff, and before the *venditioni exponas* had been issued.

On said 15th day of June, 1880, Mr. Carl, the purchaser of said real estate, with his counsel called upon James Peeling, sheriff of York county, and requested him to take back the sheriff's deed, and offered the same to him, which the sheriff, after consulting his counsel, refused to accept, being advised that he had no right to do so after the deed had been delivered and check accepted for the purchase money. Mr. Carl, the purchaser, on the said 15th of June, 1880, presented his petition to the Judge at his chambers to have the sheriff's sale set aside and money refunded; and the Court issued an order to the sheriff staying proceedings, and ordering the sheriff to retain the money until the matter should be disposed of by the Court, etc. On the 21st day of June, 1880, Mr. Carl, the petitioner, presented his petition to the Court asking the Court for reasons therein stated.

1st. To show cause why the said sheriff's sale should not be set aside, and why the acknowledgment of said deed should not be vacated and the said deed canceled.

2nd. To show cause why the said sheriff should not refund to your petitioner the said money paid by him for purchase money of said property.

3rd. You petitioner further prays that such other and further relief may be granted in the premises as equity and justice may require and to Your Honors may seem proper.

The Court on October 11, 1880, filed an opinion and made the rule absolute, and ordered Jere Carl to pay the costs of the sheriff's sale and of this proceeding.

Charles H. Smith obtained judgment *v.* Henry Strine, Jacob Strine and Jere Carl for $207.00 on the 26th day of June, 1875, to January Term, 1875, No. 7, the lien of which judgment expired June 26, 1880, after the sheriff's sale and after the delivery of the sheriff's deed to Mr. Carl and before the sale was set aside by the Court, which judgment was the first lien on the property on the day of the sale and the plaintiff in said judgment claims from the sheriff the amount of said judgment, interest and costs. There are also other judgments entered subsequently to the judgment of Charles H. Smith. James Peeling, the late sheriff of York county, takes this method to have the Court's decree setting aside said sheriff's sale and ordering him to repay the purchase money vacated and reserved.

The Court's opinion will be found in Carl *v.* Strine, *et al.*, 1 YORK LEGAL RECORD 141.

Horace Keesey and V. K. Keesey for appellant.

The title of the defendant in the judgment passed to the purchaser, and the lien of the judgment *as against the defendant* did not expire, although more than five years did run after entry of judgment and before the date of sheriff's sale:

Brown's Appeal, 37 Legal Intelligencer 426.

Where the owner of lands charged with liens makes a conveyance which is fraudulent as against creditors, a sheriff's sale under a judgment subsequently obtained, against the grantor, passes only the title of the fraudulent grantee, charged with the judgments entered prior to the fraudulent conveyance:

Byrod's Appeal, 7 Casey 241.
Fisher's Appeal, 9 Casey 294.

But this doctrine can not apply in this case, as there was no conveyance whatever.

The judgment creditors, in their order, are entitled to the purchase money as against the defendant:

Vorheller's Appeal, 12 Harris 109.
Brown's Appeal, 37 Legal Intelligencer 426.

The title vested in the purchaser at the moment of the delivery of the sheriff's deed, and could only be transferred back to the defendant by a conveyance from the purchaser:

Wiley *v.* Christ, 4 Watts 199.
4 Kent 451.

The judgment creditors of the defendant were entitled to this money when the deed was delivered:

Pennell's Appeal, 8 Harris 515.
Erl *v.* Erl, 9 W. & S. 147.

Shakespeare *v.* Delaney, 5 Norris 109, cited by the Court below, is not applicable as in that case the rights of judgment creditors were not affected.

James B. Ziegler and Blackford & Stewart for appellee.

If the title of the purchaser procured through the sheriff's sale be valid, and unencumbered by the liens of record upon the premises at the time of the sale, he has no objection to accepting the sheriff's deed, and paying his money.*

The levy of the property, by virtue of the execution process, created no lien, independent of the judgment itself:

Davis *v.* Ehrman, 8 Harris 256.

The title procured by the purchaser at the sheriff's sale being encumbered by the liens of record, upon the premises at the time of the sale, it would be a hard-

*By reference to the opinion of the Court below, (Carl *v.* Strine, 1 YORK LEGAL RECORD 141,) it will be seen that the Court held that the purchaser only took the defendant's title, and that the liens upon the property were not discharged by the sale. This question was not decided by the Supreme Court in this case; but in the case of Reynold's Appeal, *infra*, it was held that a *vend. ex.* could not issue upon a judgment whose lien had expired, which would seem to infer that such a sale would not be vaild even against the defendant in the execution.

ship to compel him to pay his money and take the title so encumbered.

A. N. Green, for Eli Kindig, a judgement creditor, contended that the facts were not correctly stated in the paper books or printed arguments in the case; and in support of his position, he presented exemplifications of the records of the judgments from the Common Pleas, which showed the fact that the judgment of Chas. H. Smith *v.* Henry Strine, Jacob Strine and Jere Carl, for $207, to January Term, 1875, No. 7, was paid to Mr. Smith by Mr. Carl, on the 15th day of Jan., 1876, and therefore Mr. Smith did not and had no legal right to ask the sheriff to pay him the amount of that judgment. Hence the Court did not take away from him any rights in setting aside the sheriff's sale.

The sheriff was protected in refunding the money to Mr. Carl, by the decree of the Court. In support of the Court below the following cases were relied upon:

Crawford *v.* Boyer, 2 Harris 282.
Cummings' Appeal, 11 Harris 509.
Shakespeare *v.* Delaney, 5 Norris 108.

May 16, 1881. PER CURIAM. The appellant who is the sheriff has no interest which entitles him to appeal. The order of the Court below will fully protect him in paying over the money and beyond this he has no interest.

Reynolds' Appeal.

Execution—Issuing of vend. ex. after expiration of lien of judgment.

A *vend. ex.* acquires no lien distinct from or independent of that of the judgment.

It is an integral part of the process for the enforcement of the lien of the judgment.

A *test vend. ex.* may be issued after the expiration of the judgment, *only* because the statute gives the *fi. fa.* a lien for five years from the date of its entry in the other county.

Where lands have been extended by an inquest at an annual rental, a *vend. ex.* cannot be issued for the sale thereof after the lien of the judgment on which it is issued has expired, and there has been no revival. Under the Act of March 26th, 1827, the lien of the judgment must be kept alive, notwithstanding any process of execution upon it. If that is not done, the right to issue execution for the sale of lands upon which it was a lien expires at the end of five years from the date of its entry. The money arising from the half-yearly installments under an extension is payable, not necessarily to the plaintiff in the writ under which the lands were extended, but to the lien creditors in the order of priority of liens. Jameson's Appeal, 6 Barr 283, and Davis *v.* Ehrman, 8 Har. 256, followed.

Appeal from the decree of the Court of Common Pleas of Luzerne County.

The facts in this case are given in the Courts' opinions.

The opinion of the court below, RICE, P. J. is as follows:

Rule to show cause why writ of *vend. ex.* shall not be set aside at plaintiff's cost.

On June 1st, 1877, the defendant's real estate was extended at an annual rental of three hundred dollars, but we are not informed whether the *fi. fa.* upon which the extension was had was issued on this or some other judgment. The defendant elected to retain the land, and in pursuance of the extent paid to the plaintiff in this judgment four semi-annual installments of one hundred and fifty dollars each. The present judgment was entered December 31st, 1874, and has not been revived.—When the January, 1880, installment became due, the defendant paid it to the judgment creditor next in lien, claiming that the lien of the judgment in controversy had expired December 31st, 1879.—Thereupon the plaintiff, on March 9th, 1880, issued this *vend. ex.*, which upon the facts above stated, we are now asked to stay.

The act of March 26th, 1827, P. L. 129, provided that no judgment should continue to be a lien for a longer period than five years from the date of its entry or revival unless revived, notwithstanding an execution may be issued within a year and a day, etc., and *"notwithstanding any other condition or contingency may be attached to such judgment."*

It needs no argument to show that a *vend. ex.* acquires no lien beyond or distinct from that of the judgment, or the *fi. fa.* which preceded it; hence, if the plaintiff here cannot in any event take anything by the sale, he ought not to be permitted to go on. Assuming for a moment what is probably the fact, that the extension of the defendant's real estate was had upon a *fi. fa.* issued on this judgment, it is equally well settled that since

the act of 1827 the *fi. fa.* acquired no lien on this land distinct from or independent of the judgment, and that when the lien of the latter expired, the lien of the *fi. fa.* and the levy made under it died with it.—Jameson's Appeal, 6 Barr 283; Davis *v.* Ehrman, 8 Har. 256. It is true it was held in Packer's Appeal, 6 Barr 277, that a *fi. fa.* levied on land upon which the judgment was not a lien acquired a lien on the date of the levy prior to the lien of judgment entered subsequently; but it has over and over again been decided that where the execution is the mere instrument for enforcing the existing lien of the judgment, it acquires no lien beyond or distinct from that of the judgment.

The analogy sought to be drawn from the lien acquired by *test. fi. fa.* cannot be sustained. The statute, in express terms, gives to this writ a lien for five years from the date of its entry in the other county, and it is this statutory lien, and not the common law lien, which, prior to the act of 1827, was held to be an incident of seizure under *fi. fa.* which authorizes a sale on *vend. ex.*, notwithstanding by lapse of time the lien of the judgment in the original county may have expired; Neil *v.* Calwell, 16 Smith 216.

It is argued further by the plaintiff's counsel that where the land is extended and taken by the defendant, then the statute gives a *vend. ex.*, upon proof of failure to pay the semi-annual installments as they become due; and that until the debt, interest, and costs are paid, this statutory right to sell the land upon *vend. ex.* exists independently of the right to seize and sell in satisfaction of a lien, notwithstanding the fact that more than five years has elapsed since the entry or revival of the judgment. The argument is ingenious, but in view of the language of the statute, and the consequences which would follow such a practice, is not convincing. By section 3 of the act of Oct. 13th, 1840 (P. L. 2; P. D. 649, *pl.* 72), upon failure to pay, etc., the plaintiff "may issue a writ of *vend ex.* for the sale of the real estate as fully and with like effect *as though a condemnation thereof had taken place.*" If these words mean anything, it is that there is the same and no greater authority to sell after an extent and default as there is after a condemnation. It will be seen that this language does not and cannot have the effect of annexing a condition or contingency to a judgment, by which its lien is practically continued in case of an extent, which would not be annexed to it in case of a condemnation, and hence the writ in the former case as in the latter is only an integral part of the process for enforcing the existing lien of the judgment.

So if the *vend. ex.* is issued at the instance of a judgment creditor other than the one upon whose writ the land was extended, under the act of 1855 (P. L. 313; P. D. 650, *pl.* 74), it must be by virtue of an alleged lien, for the language used is: "But any plaintiff in a judgment, or other person *claiming to have a lien* upon said real estate," etc.

In the absence of express authority for the construction claimed by the plaintiff, the consequences of holding to his theory are to be considered, and would be mischievous in the extreme. The act of 1827 declares that the lien of a judgment shall not continue more than five years unless revived, but the effect of permitting this sale to go on would be to declare that although the lien of the judgment is gone, the land may be sold an indefinite number of years afterwards. An extent had just before the lapse of the five years would render the land liable to be sold at least seven years after. Can it be possible that any such effect was contemplated? There is no provision as to notice to subsequent purchasers or mortgagees, and they would be in constant danger of having their land swept away from them on judgments of which they had no notice. As was said by Woodward, J., in Davis *v.* Ehrman, *supra*, this practice would nullify the remedial pro-

visions of the act of 1827, and restore the evils, confusion of records, the uncertainties of title, and the restraints of alienation, which had grown up under the old act of Assembly.' We think the plaintiff was not entitled to the writ.

From this decree the present appeal was taken.

GREEN, J. The appellant's judgment was entered on December 31, 1874, and was never revived, nor was any writ of *scire facias* to revive ever issued upon it. On December 31, 1879, the lien of the judgment expired by force of the act of March 26, 1827. A writ of *fi. fa.* having been issued against the defendant, his real estate was extended on June 1, 1877, at an annual rental of three hundred dollars, and the defendant elected to remain in possession, as he was authorized to do by the third section of the act of 13th October, 1840 (P. D. 649, *pl.* 72). The semi-annual installments were regularly paid to the appellant as plaintiff in his judgment, No. 1020, January term, 1875, until the installment for January, 1880, fell due, which was paid by the defendant to the plaintiff in the judgment next in lien, upon the theory that the lien of the appellant's judgment having expired, the judgment creditor having the next lien was entitled to the money. Thereupon the appellant issued a *vend. ex. de terris* for the sale of the defendant's land, which was set aside by the court on the ground that the lien of the judgment having expired, the writ was unauthorized.

Of this action of the court below the appellant complains. He argues, as he must, that the right to issue a *vend. ex.* in such circumstances arises upon the construction of the act of 1840. Independently of that act, it is very clear that the writ could not issue after the lien of the judgment had expired. The act of March 26, 1827, section 1 (P. L. 129; P. D. 820, *pl.* 5), contains a positive prohibition against the continuance of the lien of a judgment for a longer period than five years from the date of entry, unless revived by the written agreement of the parties, or unless a writ of *scire facias* to revive is sued out, within that period. It is equally imperative in directing that the issuing of an execution during the pendency of the lien shall not have the effect of prolonging the lien beyond the time fixed by the statute.

In Jameson's Appeal, 6 Barr 283, we held, speaking of the act of 1827, that "that act changed the whole face of the law on that subject by cutting off every pretense of lien, except that of the judgment, revived at proper intervals by *scire facias* or agreement; in consequence of which it became necessary to revive from time to time, though execution were levied, till the land was actually turned into money by a sale."

In Davis *v.* Ehrman, 8 Har. 256, the same ruling was repeated, and it was also held that a *fi. fa.* issued to enforce the lien of a judgment, and the seizure of the land, does not create a lien on the land distinct from and independent of the lien of the judgment. Woodward, J., on page 259, said: "A lien is, indeed, a necessary and inseparable incident of seizure in execution, except where the execution is merely instrumental in enforcing a prior and superior lien by judgment. In such case it never was supposed by the Legislature or the profession that a judgment, and an execution on it, had each a distinct and independent lien. To limit the lien of judgments so explicitly as is done by the act of 1827, and to leave the lien of executions unlimited, would have been absurd legislation." It was also held in that case, as it has been in others, that a *testatum fi. fa.* is a lien upon lands by virtue of a special act of Assembly, and that a *fi. fa.* levied upon after acquired lands becomes a lien thereon because the judgment on which it issued was not, and hence there is no analogy to the present case to be derived from those illustrations. As the present is the mere case of the issue of a *vend. ex.* upon a judgment whose lien had expired, it follows that it was an unauthor-

ized writ, unless there is something in the act of 1840 which gives it a lawful character.

The appellant's contention on this subject is, that by the express terms of the third section of the act, the defendant becomes liable to pay to the plaintiff the half yearly installments, until the debt, interest, and costs of the *fi. fa.* are fully paid, and that on default for thirty days in the payment of *any* half-yearly installment, "it shall be lawful for the plaintiff, upon making affidavit thereof, and filing the same in the prothonotary's office, to issue a writ of *venditioni exponas* for the sale of said real estate, as fully and with like effect as though a condemnation thereof had taken place."

It is argued that there is no provision requiring the continuing of the lien in the act, and that as the payments are to continue until the whole amount of debt, interest and costs is paid, the right to issue a *vend. ex.*, upon default in any of the payments, is absolute, and continues throughout the whole period of the payments.—The argument is plausible, but, in our opinion, unsound. The right to issue the *vend. ex.* after default is not an absolute and unqualified right. The very words which confer it restrain its operation, so that it can only be exercised "as fully and with like effect as though a condemnation thereof [of the lands] had taken place."

This phraseology remits us at once to the enquiry, which would have been the plaintiff's right to a *vend. ex.* if the lands had been condemned instead of being extended? The answer to that question is too plain for argument. The writ of *vend. ex.* could only issue while the judgment was a lien. Under the act of 1827, the lien of the judgment must be kept alive, notwithstanding any process of execution upon it. If that is not done, the right to issue execution for the sale of lands upon which it was a lien expires at the end of five years from the date of its entry.—There is nothing in the act of 1840 repealing the act of 1827, nor do any of its provisions purport in any manner to give a new or different life to the lien of judgments from that which was given by the act of 1827. On the contrary, the fourth section of the act of 1830 expressly provides "that the money arising from the half-yearly installments shall, under the direction of the court, be distributed among the different lien creditors according to the priority of their liens, in the same manner, and like effect, as in case of distribution of money arising from sheriff's sales." The money is therefore payable, not necessarily to the plaintiff in the writ under which the lands were extended, but to the lien creditors in the order of priority of their liens. The act must therefore be read and interpreted with reference to the existing state of the law as to liens and the proceedings under them.

In view of these considerations, we think the action of the court below in setting aside the writ of *vend. ex.* issued in this case was clearly right, and the order must therefore be affirmed.

Order affirmed and appeal dismissed at cost of the appellant.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

County Commissioners—Powers of—Contingent Attorneys' fees.—A contract by County Commissioners to pay an attorney a contingent fee of fifty per cent. out of the amount recovered by litigation, is beyond their powers, against public policy, and null and void. County Commissioners are but trustees of moneys received for the use of the county, and such a contract would be stricken down by a court of equity as improvident.—*County of Chester v. Barber et al.*, 1 Chester County Reporter 225.

YORK LEGAL RECORD.

VOL. II. THURSDAY, JULY 21, 1881. NO. 20.

SUPREME COURT.

Robert Peet v. The City of Pittsburgh.

A committing Magistrate is the sole judge of the facts sworn to before him and their application, subject only to the review of the Quarter Sessions. This court is not authorized to pass upon facts set out in the transcript of the Magistrate, nor can it review the evidence upon which the judgment is founded, even though it be incorporated in the opinion of the court below.

Certiorari to the Court of Quarter Sessions of Allegheny county.

Robert Peet, the plaintiff in error, was a member of a committee appointed by a literary association, to which he belonged, for the purpose of making necessary arrangements for the delivery of a lecture by B. F. Underwood, Esq., at Library Hall, Pittsburgh, on the evening of May 11, 1879, at 7:30 P. M. The title of the lecture was, "If not Christianity What? An admission fee of twenty-five cents was charged. An application was made to the Mayor for a license, but he refused to grant one without assigning any reason for such refusal.

On May 12, 1879, an information was made against the plaintiff in error before the Mayor of Pittsburgh, and a warrant issued for his arrest, the charge being "for unlawfully exhibiting an entertainment and lecture by one B. F. Underwood, at Library Hall, in said city, on the evening of May 11, 1879, without first having received a license or permit from said Mayor, contrary to a city ordinance passed in pursuance of an act of Assembly of the Legislature of Pennsylvania." After a hearing the defendant was "duly convicted," the Mayor being of the opinion "that the lecture, delivered on May 11, 1879, by B. F. Underwood, at Library Hall, was an exhibition," etc., etc., and imposing on the defendant a fine of "twenty-five dollars and costs, or in default of payment thereof to be committed to the Allegheny Co Work House for a period of twenty days." The defendant paid the fine. He then applied to and obtained from the Court of Quarter Sessions of Allegheny county the right to file in said court an appeal from the summary conviction of said Mayor.

On March 17, 1880, the Court, WHITE, J., filed the following opinion, dismissing the appeal at the cost of the appellant:

The act of April 6, 1867, gave the city "power to regulate, license or prohibit all theatrical exhibitions and public shows, and all exhibitions, of whatever name or nature, for which money or any other reward is in any manner demanded or received: *Provided*, That lectures on historic, literary or scientific subjects shall not come within the provisions of this section."

The ordinance of the city prohibited all such exhibitions without a license first had from the Mayor, and for a violation of the ordinance imposed a fine not exceeding fifty dollars.

The appellant on the 15th May, 1879, was fined by the Mayor $25 and costs, $3.40, for a violation of the ordinance.—The alleged violation was an exhibition or entertainment, by B. F. Underwood, on Sabbath evening, May 11, 1879, in Library Hall, under the auspices of the appellant and the Liberal League of Pittsburgh, at which admission tickets were sold.

It is claimed by the appellant that the entertainment was simply a lecture of a scientific, literary or historic character, for which no license was required under the proviso of the act.

This is a question of fact to be determined by the evidence. The Mayor, at the hearing before him, heard the evidence and the arguments of counsel, and decided it was not such a lecture, but was of such character as required a license under the act of Assembly and the ordinance of the city. *We have no evidence on the subject except what is set forth in the Mayor's transcript.* Whether

it contains all the evidence heard by the Mayor, we are not informed. He is not bound to set forth and return to court all the evidence. In the absence of evidence to the contrary it is to be presumed he had sufficient evidence to justify the finding of the fact.

In the transcript it appears that J. C. Kramer was sworn for defendant, and testified that he was the president of the League, and heard the lecture. He says: "The subject was to teach and enlighten the people as to the character of Christianity and as to what materialists had to offer in its stead and to show the superiority of the materialistic doctrine: If not Christianity, What? In the course of the lecture there was a discussion of the doctrine of evolution as taught by modern scientists." That may be all true, and yet the lecture may have been an "exhibition" in the meaning of the act. The leading object may have been to make money, and give amusement, like all theatrical exhibitions, by a display or exhibition of acting or oratory.

This view of the case is confirmed by the admissions before the Mayor as set forth in the transcript: "It is admitted the defendant was one of the committee of arrangements in procuring the attendance, and carrying out the lecture delivered by B. F. Underwood," as set forth in the hand-bill, "Library Hall. B. F. Underwood will deliver his famous lecture, entitled, If not Christianity, What? under the auspices of the Pittsburgh Liberal League, Sunday evening, May 11, 1879, at 7½ o'clock. Admission, 25 cents! no extra charge for reserved seats. Box open at hall, Saturday and Sunday." It is also set forth as a conceded fact, "that application was made to the Mayor for license or permit for such entertainment, to be exhibited on Sunday evening, May 11, 1879, and the issue of which was refused for said Sunday evening."

The fact of such application, and the terms in which it was made, "for such entertainment to be *exhibited*," are strong evidence that the party applying considered it came within the class of entertainments or exhibitions requiring a license.

Upon the evidence before us we can not say the fine was improperly imposed. —The appeal is therefore dismissed at the cost of the appellant.

This writ was then taken, counsel assigning for error:

1. The court erred in not disposing of the appeal *de novo*. There having been no testimony offered by the prosecutor, as is evident from the record, the court should have reversed the judgment of the Mayor, as the prosecutor was bound to establish his case *de novo*, and the court in an appeal could not pass on the merits of the case on the faith of the testimony set forth on the Mayor's transcript, even though such transcript contained all the evidence submitted, which it did not.

2. The decision of the court should have been in the form of an original judgment, and should have specified that the offence committed was not within the exception of the city ordinance, under which the conviction was had, to wit, was not a "lecture on a historic, literary or scientific subject."

3. The act of the defendant set out on the record was not contrary to law.

4. The judgment entered was not original.

There was no appearance and no paper book presented on behalf of defendant.

Opinion by GORDON, J. Filed November 22, 1880.

This was an appeal from the judgment of Robert Liddell, Mayor of the city of Pittsburgh, to the Court of Quarter Sessions, and comes to us on a *certiorari* from that court. We are confined to the record, and can pass only upon errors apparent upon its face, unless *extra* the record a want of jurisdiction has been made to appear: Shenango *v.* Wayne, 10 Ca. 184; *In re* Church street, 3 P. F. S. 353; Bergushofen *v.* Martin, 3 Yeates

479. With the evidence upon which the judgment is founded, we can have nothing to do, even though it be incorporated in the opinion of the court, for that opinion is no more part of the record than is the evidence itself: Mauch Chunk *v.* Nescopeck, 9 Harris 46; Bradford *v.* Goshen, 7 P. F. Smith 495.

What we are called to pass upon, in the case before us, are the jurisdiction of the Mayor and the regularity of the record; but as neither of these is called in question our task is an easy one; we have but to affirm the court below.

The only thing complained of is that the facts of the case did not bring it within the ordinance, but within the exceptions therein mentioned; that the matter complained of was not such a public entertainment for which license was required, but a lecture exempted by the fourth section of the ordinance. This may be as stated; we are not disposed to controvert it; but then, that was for the Mayor; of the facts and their application he was the sole judge, subject only to the review of the Quarter Sessions, and, though the facts are set out in the transcript from the Mayor's docket, we are not authorized to pass upon them.

The record, proper, exhibits a case within the ordinance, and within the Mayor's jurisdiction; the process and judgment are regular, and, such being the case, we can look no further.

Judgment affirmed.

QUARTER SESSIONS.

Q. S. of Luzerne Co.

Commonwealth v. Byrne et al.

The failure to attach certificate required by statute to the list of persons selected to act as jurors during the year, a serious but not an incurable irregularity. It may be amended, and a certificate be filed *nunc pro tunc*.

The failure by the sheriff to file his oath of qualification for drawing jurors is a serious irregularity, and a motion to quash on that ground, if made promptly, and before recognition of the validity of the indictment, will be sustained.

RIGE, P. J. These indictments were found on August 31, 1880. The defendants entered bail to January Sessions, 1881, which was, therefore, the first term to which they were legally brought into court. The cases were continued at that term, and also at the succeeding April Sessions; but, according to the affidavits, which are not contradicted, not on the application of the defendants. The court, and we suppose the District Attorney, understood that the motion to quash the array at April Sessions was made in behalf of these defendants as well as of those in the other Hazleton cases. This is expressly denied, however, and the contrary does not affirmatively appear of record or otherwise. We must, therefore, assume that this is the first time that these particular defendants have been called upon to plead to the indictments, and being so, the motions to quash are not encumbered by evidence of any previous dilatory proceeding upon their part, and in these important respects differ from the motion in the case of Commonwealth *v.* Derschuck, *infra* 84, overruled by Judge Woodward. Were it not for these material distinctions there would certainly be the same disposition of these motions as of that. Assuming, then, that this is the first time that the defendants have been called upon to plead, and they have not prejudiced their rights by any conduct recognizing the indictments as valid, the question is whether the reason for quashing the indictments are sufficient.

1st. The failure to attach the certificate required by the statute to the list of persons selected by the president judge and jury commissioners, in 1879, to act as jurors during the year 1880 was a serious irregularity, but not an incurable one. The list was duly filed, and comes from the proper custody, and bears no evidence of having been tampered with, and it is not denied that it is the list from which the jurors were drawn. Further, Judge Harding, who acted with the jury commissioners in selecting the names and filling the wheel, testifies that the list thus produced was the proper list of persons selected; that the certificate was made out and signed,

but was omitted to be attached, and filed by mistake. While, therefore, this was an irregularity, it is amendable, as it seems to me, for the same reasons given in Roland *v.* Commonwealth, 1 Norris 306, for the curing by amendment of a somewhat similar omission in a return to a venire. In other words, that the certificate could now be made and filed *nunc pro tunc*. This reason will, therefore, have to be overruled.

2d. The act of 1874 requires all oaths taken by officers who are entrusted with the drawing, selecting, and returning of jurors, to be reduced to writing, and filed of record. In the case of Sheriff Kenny, who participated in the drawing of the grand jury, this oath was not filed, nor can it now be found. This was a serious irregularity. There are important reasons why this requirement of the law should be complied with. They will readily suggest themselves, and need not be enumerated here. One main reason is that the record should furnish the conclusive evidence of the qualification of the officer to participate in the drawing. Without such evidence, this vital fact, as in this case, may be left to inference, and possibly in uncertainty. Whether the want of this evidence, the fact being satisfactorily established by parol, must necessarily vitiate the indictments found by a grand jury thus selected, need not be decided here.—It is enough to say that when the fact is the least in doubt, and the defendant has made known his objection with reasonable promptness, and has done nothing to recognize the validity of the indictment, and has had no opportunity to challenge the array of jurors, as of course these defendants have not, it is clear that the court, in the exercise of a sound discretion, ought to quash the indictment. As we understand the ruling, it was upon these grounds that the quashing of the indictment in the case of Commonwealth *v.* The Lehigh Valley Railroad Company, at the present term, was based. We feel bound by the precedent established in that case, and as the motions seem to be presented on substantially the same facts, they must have the same disposition. I would say for myself, however, that if the defendants had had the opportunity to challenge the array of grand jurors, and it appeared that the sheriff had taken and reduced to writing the proper oath, the irregularity in not filing it could not be taken advantage of on a motion to quash the indictment. It is unfortunate that the court and district attorney were misled, as stated at the outset. This, however, was undoubtedly unintentional, and not the fault of these defendants, and these motions must be disposed of on their peculiar facts, as presented by the sworn affidavits, and not on those appearing in the case of Commonwealth *v.* Derschuck. For these reasons it must not be understood that there is any conflict in the rulings.—On the contrary, our present ruling is fully recognized in the Derschuck case, and is in exact accord with the ruling in the case of Commonwealth *v.* Lehigh Valley Railroad Company.

The motions to quash are sustained.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Criminal law—Irregularity in drawing of jury.—The failure of the sheriff to file his oath of qualification for the drawing of jurors in the proper office, so that it may become matter of record, is a serious irregularity, and may be ground for quashing an indictment. Where this irregularity pertains to the drawing of a grand jury, the motion to quash should be made promptly, and at the first opportunity. Where the motion to quash, on the ground named above, was not made until the case had been three times on the trial list, and after a motion to quash the array of petit jurors at a previous term had prevailed, HELD, not to be in time, and therefore denied.—*Com. v. Derschuck*, (Luzerne Q. S.) 10 Luz. Leg. Reg. 165.

[See Com. v. Yetter, 1 YORK LEGAL RECORD 135.]

YORK LEGAL RECORD.

Vol. II. THURSDAY, JULY 28, 1881. No. 21.

SUPREME COURT.

Gray's Appeal.

The legal discretion of the Orphans' Court in the appointment of guardians of minors is not subject to review by the Supreme Court.

A minor on attaining fourteen years of age has not an absolute right of choice of guardian so as to remove his former guardian against whose proper administration no charge was alleged.

Appeal from Orphans' Court of Allegheny county.

This was a petition by Phineas T. Gray, stating that he is a minor child of Phineas R. Gray, late of the City of Pittsburg, in the County of Allegheny, and State of Pennsylvania, deceased, above the age of fourteen years, to wit, of the age of fifteen years on the 10th day of March, 1880.

That your petitioner on the 29th day of November, 1873, by his next friend, W. M. Gray, presented a petition to the Orphans' Court of Allegheny county, in the said State of Pennsylvania, showing that he was a minor child of the said Phineas R. Gray, late of said county, deceased, under the age of fourteen years, and had no guardian, and that he was entitled to real estate of no annual value, and to personal estate amounting to about two thousand dollars, and praying the court to appoint some fit person guardian of his person and estate, whereupon said court appointed Jos. H. Gray his guardian, who gave bond, with sureties, approved by the court, and entered upon the discharge of his duties as such guardian, as will appear by reference to proceedings at No. 238 of September Term, 1873, of the Orphans' Court of Allegheny county.

That your petitioner is entitled to the one undivided ninth part of a certain tract of land situate in North Huntingdon Township, Westmoreland County, Pennsylvania, containing two hundred and thirty-two acres, of about the annual value of sixty dollars; and to personal estate amounting to the sum of two thousand dollars.

Your petitioner, therefore, prays your Honor to permit him to make choice of some suitable person as guardian of his person and estate, instead of said Joseph H. Gray, heretofore appointed by said court, and he will ever pray, etc.

An answer was filed, and afterwards the court refused the application, filing the following opinion by Hawkins, P. J.:

"When the Legislature gave the 'Orphans' Court of each county * * * the care of the persons of minors resident within such county, and of their estates, and * * * power to admit such minors when and as often as there shall be occation, to make choice of guardians,' it gave in plain terms discretionary power to that court in the appointment of guardians; McCann's Appeal, 49 Penna. State Reps. 304. The law presupposed the immaturity of minors and the consequent necessity of 'care' over their persons and estate. Is there 'occasion' in the present case, to admit the petitioner to make choice of a new guardian in place of the old?

"He already has an unexceptionable guardian. A change of guardian will involve the filing and auditing the account of the old guardian, and the expense and cost incidental thereto, which must be borne by the minor's estate. It may, and probably will become necessary to call in the present investment, and a change of policy will follow in the administration of the trust; this will cause delay and consequent loss to the minor's estate. These are some of the obvious objections to change. On the other hand no special advantages are adduced for making it.—The application is based entirely on an asserted 'naked right of choice.' If such right exist, why come into the Orphans' Court at all? If the petitioner is competent to make choice without the supervision of this court, then he does not need its 'care,' he is competent to transact his own business, and there is no occasion for a guardian; but if, as the Legislature has

asserted, he needs its 'care,' he needs its supervision in the selection of a guardian. There can be no 'occasion' to make choice of another guardian, where no advantages can be attained. It follows that the circumstances of this case do not justify a change of guardians, and the application to be admitted to 'make choice' must be refused.

"And now, to wit, October 2d, 1880, it having been admitted at the hearing in this case that Joseph H. Gray, the present guardian, is an entirely suitable person to act as such guardian, and it not having been shown that it would be to the advantage of said minor that there should be a change of guardian, the above application is refused. It is directed that the costs of this application be paid out of the petitioner's estate."

Which was assigned as error.

Counsel for defendant contended that a minor over 14 years of age had the right to choose his own guardian, and cited Arthur's Appeal, 1 Grant's Cases, 55; Lee's Appeal, 3 Casey 229; Reeves' Domestic Relations, 321; Lewry's Estate, 35 Legal Intelligencer 475.

Counsel for appellee contended that under McCann's Appeal, 13 Wright 304, the Supreme Court could not review the action of the Orphans' Court.

PER CURIAM. November 22, 1880.

As we understand the decision in McCann's Appeal, 13 Wright 304, it is very correctly stated in the syllabus. "The legal discretion of the Orphans' Court in the appointment of guardians of the persons and estates of minors, is not subject to review by a Court of Error." It follows that we ought not to intervene, even if we thought that the discretion of the court below was not properly exercised in this case.

Decree affirmed and appeal dismissed at the cost of the appellant.

COMMON PLEAS.

C. P. of Delaware Co.

Jones v. Fernwood Masonic Hall Association.

Practice—Amendments, when permitted—Amendments at common law and under the statute.

When the narr. alleged an excessive distress for rent and admitted $500 rent in arrear, an amendment on the trial substituting $450 for $500 is proper.

An amended narr., filed by the plaintiff on leave granted, after the continuance of the case for surprise on account of a previous amendment, for the purpose of covering all the grounds of complaint upon which he had offered evidence at the trial, must be considered as an amendment at common law and entirely within the discretion of the Court.

Sur demurrer to amended narr.

The opinion of the Court was filed May 2nd, 1881.

CLAYTON, P. J. This case was partly tried at the last term of the court, and all the causes of action, now introduced into the amended narr, were sustained by some evidence. At the close of the trial it was found that the declaration did not fully cover all the complaints upon which proof had been submitted. The narr, consisted of but one count, admitting $500 as the true amount of rent in arrear, and alleging a distress for $800, and subsequent sale of the goods levied on for the full amount of the unlawful claim, to the damage of the plaintiffs. The proof showed that the rent in arrear might not be more than $450. The plaintiff moved to amend the narr, by striking out $500 and inserting $450; the defendants objected, as they had come to the trial with, at least, $500 of their claim admitted. The amendment was allowed, and on the defendants' motion, alleging surprise, the case was continued. The plaintiff then asked for leave to file additional counts covering all the matters of complaint upon which he had offered evidence on the trial. This leave was granted *after* the case had been continued for surprise on account of the first amendment. This is an important fact in the case, as the amendments, now demurred to, are at common law, and not under the statute.

Much of the apparent confusion in the cases on the question of amendments

which may, and those which may not be permitted, will be made clear, by observing, 1st, Whether the amendment proposed was at common law, or under the statute. 2nd, Whether made on the trial, or, on leave granted, between terms.

At common law no amendment at the trial, which placed the opposite party at any disadvantage, was permitted. The statute for consolidating causes of action as far as possible, permitted such amendments, but gave the opposite party the right, in a proper case, to plead surprise and claim a continuance. In such cases, however, no amendment, which introduced an entirely new and distinct cause of action was permitted. And this for obvious reasons, as the opposite party came prepared to try the issue stated in the declaration, and not a new or distinct one. Thus, if the action was trespass for breaking in a house in one township, a count could not be added on the trial, for breaking into a barn or field in another township, or for a battery of the plaintiff on some other occasion. But, if the plaintiff, after having filed his declaration, discovers he has not fully stated his whole cause of action, as where the declaration is for trespass in breaking into a dwelling house, on the same occasion, and growing out of the same transaction, the goods of the plaintiff were carried away, and he and his servants were assaulted and beaten, the court would permit an amendment, even on the trial, for without it, the whole case would not be tried upon its merits.

If, on the other hand, a plaintiff sues for debt on bonds for different sums, and, after declaration filed, he finds by mistake or inadvertance he has only declared on one bond, he will not be permitted, on the trial, to amend by filing counts on other distinct notes, bonds or deeds. But he may, at common law, at a reasonable time before trial, move the court for leave to either withdraw the narr filed, add new counts, or amend it, by introducing entirely new and distinct causes of action.—The reason is equally obvious. No harm is done to the defendant, no surprise can be alleged, and he has the advantage of having tried in one suit what might otherwise be the subject of many actions. As a general rule, a party will not be permitted to bring several suits for one injury, or to split up one transaction into several actions when they can be all tried in one suit. Should such several actions be brought, the court will compel the plaintiff to consolidate them into one suit. For the same reason, the court will encourage, rather than condemn, an amendment, if made in time, the object of which is to try in one suit all matters at variance between the parties. It is an error to suppose that no amendment on the trial can be made which introduces a new cause of action. The rule is, as I understand it, that all new causes of action *growing out of the same controversy* and inseparably connected with it, may be introduced into the suit, on the trial by an amendment at bar, and, that only those new causes of action which are entirely distinct and disconnected with the controversy in question, are excluded from the privilege of amendment at the trial. The latter may, however, be brought into the suit by motion in due time at common law. See Newlin *v.* Palmer, 11 S. & R. 98, 101; Coxe *v.* Tilghman, 1 Wh. 281; Cassell *v.* Cooke, 8 S. & R. 268-287. In the last cited case, the court states the rule to be this (referring to a proposed amendment under the statute, on the trial): "The true criterion is, whether the alteration or proposed amendment is a new and different matter—another cause of controversy; or whether it is the same contract or injury, and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with his proof, and the merits of his cause." See also, Cunningham *v.* Day, 2 S. & R. 1; Roderigue *v.* Curcier, 15 ib. 81; Bank *v.* Israel, 6 ib. 293; Smith *v.* Rutherford, 2 ib. 358. Measuring the causes of action in the amended narr., now before us, by the

above principles, it is very doubtful if the proposed amendments could not have been made at the trial, but, as this amended narr. was filed on motion and leave obtained after the case had been continued for alleged surprise on an undoubtedly proper amendment at common law and entirely within the discretion of the court, and as it is better for both parties as well as the economy of public time, that all controversies between them should be settled in one suit, the amendments are permitted.

The defendant has leave to withdraw the demurrer, and must plead to the amended narr.

C. P. of Schuylkill Co.

Seipt v. McFadden.

If there is a misdescription in the Sheriff's advertisement, the sale will be stayed.

In case of laches in making the application to stay the sale, the party guilty of laches must pay the costs caused thereby.

Rule to stay Sheriff's sale.

PERSHING, P. J. The ground of the defendant's application is a misdescription of the real estate advertised to be sold.—This same property was sold by the Sheriff in the year 1876, and the sale set aside at the instance of the defendants, but upon a different ground. The Sheriff has described the building as a two-story frame dwelling house, with "a brick front stone basement, &c." It appears that the walls on two sides are of stone, but they are concealed from view by adjoining buildings. The house is not on Acre street, as described in the advertisement, but on Lang street, immediately opposite the mouth of Acre street, where it enters Lang street. We think there is such a misdescription of the premises as requires an amendment of the levy. We must, however, regard the defendannt as guilty of laches in waiting till the alias writ of *venditioni exponas* was issued, and the time for sale just at hand before making his application to the Court. He has had knowledge all along of the defect in the description, and good faith demanded that he should act at the earliest moment. The costs which have accrued in consequence of his negligence should not fall on innocent lien creditors.

And now, September 10th, 1880. The rule is made absolute, and the above writ of *venditioni exponas* is directed to be stayed at the costs of the defendant.

C. P. of Carbon Co.

Van Horn v. Independent Order I. O. of C. T., No. 76.

A justice of the peace, after hearing may continue a case for consideration to some day and hour certain; but the record must show the adjournment and continuance.

Certiorari.

DREHER, P. J. The transcript of the justice shows that the summons was returnable August 31st, 1880, at 10 o'clock A. M. It does not show that the parties met on that day. After stating the constable's return of service of summons, it proceeds thus: "Plaintiff's claim is for work and labor done $5.12. The above case continued to September 1st, 1880, at 10 o'clock A. M. J. E. Van Horn, sworn; Leslie Bower, sworn; Joseph Hummel, sworn. And now, September 4th, 1880, judgment in favor of the plaintiff and against the defendant for $5.12 and costs of suit."

It will be observed that it does not appear that the parties met on August 31st, the return day of the writ. It is stated that the case was continued to September 1st, 1880, at 10 o'clock A. M. But by whom, when continued, is not said; nor does it appear that the parties met September 1st. And again, judgment was entered September 4, 1880, without any adjournment or continuance to that day. This is clearly erroneous. The justice, after hearing the evidence, may continue the case for consideration to some day and hour certain; but, then, the record must show the adjournment or continuance.—These defects in the record are assigned as errors in the exceptions filed by defendant, and the judgment must be reversed.

And now, April 22d, 1881, the judgment of the justice is reversed.

YORK LEGAL RECORD.

VOL. II. THURSDAY, AUGUST 4, 1881. No. 22.

SUPREME COURT.

Detwiler's Appeal.

Assignment for benefit of creditors—Assignee not bound to let the real estate assigned to him.

A voluntary assignee for the benefit of creditors is under no obligation to let the real estate included in the assignment, and, therefore, where he allowed the assignor to retain possession of, and to use said real estate:

HELD (reversing the decree of the Court below), that he was not chargeable in his account with the rental value thereof.

Appeal of John S. Detweiler from a decree of the Common Pleas of Fayette Co.

The following were the facts: On April 22, 1876, Samuel Detweiler executed a voluntary assignment of his real and personal estate to John S. Detweiler, in trust, to sell, etc., etc., for the benefit of the assignor's creditors. At the time of the assignment there were several judgments against the assignor, and other judgment liens thereon to a large amount were obtained soon afterwards. The real estate included in the assignment consisted of four farms, on one of which the assignor lived and had erected a grist and a saw mill. The assignor retained possession of the real estate, running and operating the grist mill and saw mill just as he always did before the assignment, and farming the land with men under his employ. The assignee took no possession of the real estate, and received no rent therefrom. On May 3, 1878, two years after the assignment, none of the land having yet been sold, the assignee filed his account of the personal estate which he had received. Exceptions being filed thereto, Daniel Downer, Esq., was appointed auditor, who made report, surcharging the assignee with the sum of $2935, the estimated rents which the real estate and saw mill and grist mill would have produced had they been let. Exceptions having been filed on behalf of the assignee to this report, the Court dismissed the exceptions and confirmed the report, saying, *inter alia*, "We do not see how the assignee can be relieved from liability for rents of the real estate conveyed to him in the deed of assignment, and included in the appraisement. If he permitted the assignor to remain in the actual occupancy of the real estate, using and enjoying the profits thereof, we must conclude that the assignor did so as the agent of the assignee, otherwise the assignee failed in the proper discharge of his duty in not taking possession of the real estate. He seems to have considered that the property was in his possession, as he paid the taxes on it, and also paid the insurance on the buildings; and for such payment has been allowed a credit in his account."

The assignee thereupon took this appeal assigning the action of the Court in dismissing the exceptions and confirming the decree for error.

January 3, 1881. THE COURT. This contention relates to the liability of the appellant for rent of the real estate assigned to him for the benefit of creditors. In April, 1876, Samuel Detweiler executed a voluntary assignment of his real and personal estate to the appellant, in trust for the latter to sell and dispose of the same, and if any part thereof remained, after paying the debts of the assignor, to deliver over and reconvey the same to him. At the time the assignment was made, there were several judgments against the assignor, which were liens on the lands assigned, and other judgment liens thereon to a large amount were obtained soon afterwards. The assignor retained possession of the real estate. The appellant took no possession thereof, and received no rent therefrom. On settling his account of the personal estate which he had received, exceptions were filed thereto, the main ones being for his not having charged himself with the value of the rents of the real estate. The Court held him liable therefor, and decreed accordingly. This is assigned for error. The correctness of this decree must be ascertained by a

consideration of the effect of the assignment, and of the duty thereby imposed on the assignee. It is well settled that a voluntary assignee is the mere representative of the assignor, enjoying his rights only, and is bound where he would be bound. Neither he nor the creditors for whom he holds the property in trust, are purchasers for value. They are not parties to the deed. They have not relinquished anything in compensation for the benefits of the trust. They have not agreed to look to the property assigned for the satisfaction of their claims. They have no title to the property itself. They acquire a right only to enforce the duty undertaken by the assignee. (Twelves *v.* Williams, 3 Whart. 485; Jeffers's Appeal, 9 Casey 39; Folton's Estate, 1 P. F. S. 204; Wright *v.* Slingluff, 3 Norris 163; Norris's Appeal, 7 Id. 368).

The assignment on its face does not impose on the assignee any duty to let the real estate. It was liable at any time to be sold by virtue of executions on the judgment liens. Any attempted letting must have been for a term of uncertain duration. A lien creditor could proceed at his will to sell the real estate. Other creditors, on application to Court, could enforce a sale. In view of the fact that no creditor caused a sale to be made, the presumption is that no sale was desired while the value of real estate was so much depreciated.

It is contended that inasmuch as the 34th section of the Act of 16th June, 1836, (Purd. Dig. 782) vests the estate in the assignee, and makes it his duty to take possession of the property, if he fails so to do, he is liable to the creditors for an amount equal to the value of the rents.—At first sight, this section might produce such impression on the mind. In general terms, it deals with all the property assigned, and gives a right of possession.—It then stops. It does not profess to declare or define the duties of the assignee after he has taken possession of the land. A previous section of the same act had already defined his duty to be "to convert the real and personal estate of such insolvent into cash" (Id. 780, pl. 32). Thus the manifest intent of the Act is to give a power of sale, not a power to let. The object of the assignment is to convert the property by sale, and not for the assignee to work the land or let it to others. His position is similar to that of an executor with a naked power of sale, yet we are not aware he has ever been held liable for rents not received. A creditor cannot rest on his rights, refrain from all action to induce a sale, and thus charge the assignee with rents which he never received. The learned Judge, therefore, erred in surcharging the appellant with rents not received, and the decree must be modified accordingly.

And now it is modified and decreed, that the sum of $2935 be stricken from the sum adjudged to be in the hands of the appellant; and the residue, being $7487.03, be and hereby is adjudged and decreed to be the true sum due from him. So modified, the decree is affirmed. It is further ordered that the costs of this appeal be paid out of the fund.

Appeal of the Overseers of the poor of White Deer Township, Pennsylvania.

[1]The claim of $300 exemption is a personal privilege, and may be withdrawn at any time by the defendant. The fact that defendant was a pauper and a charge on the township does not prevent his having the right to withdraw his claim.

Appeal from the Court of Common Pleas of Union county.

MERCUR, J. This contention is for a fund produced by a sheriff's sale of the real estate of one Gabriel Huntingdon. It arises between his lien creditors and the Overseers of the Poor. It presents a question of the power of Huntingdon, after he had become a charge on the poor district, to make and withdraw a claim for $300 dollars of property, under the act of April 9th, 1849.

After the judgments on which the money is claimed had attached as liens to the land, and after a *fi. fa.* had issued

on one of them, but before the return day thereof, Huntingdon applied for relief. —An order therefor was duly granted. —Under this order the overseers took charge of Huntingdon, and have continued to provide for him. Several days thereafter the *fi. fa.* was levied on the land. About a month after the order of relief was procured, Huntingdon made claim to the $300 exemption. The appraisers found that the land could not be divided without spoiling the whole, and Huntingdon then claimed the $300 out of the proceeds of sale. The land was sold on a writ of *vend. exp.*—Afterwards, by writing duly executed by Huntingdon, he withdrew his claim for exemption, and agreed "that the sheriff pay out the said money as if no such claim had been made." This writing was returned with the writ on the return day thereof. The sheriff thereupon asked leave to pay the money into court, and it was so paid.

The act of 1849, allowing the exemption, does not force it on a debtor. He may or may not claim it at his option. It is a personal privilege, which he may release. It is a contingent right, which is lost by an omission to claim it at the proper time. In case he does duly claim it, he may withdraw the claim at any time before the property is set off, or money decreed to him: Kyle and Dunlap's Appeal, 9 Wright 334. Conceding this power to exist in one who is *sui juris*, it is contended that Huntingdon could not withdraw the claim. The act of 13th of June, 1836, authorizes the overseers of a district in which a person has become chargeable to sue for and recover any personal or real estate belonging to him, and to collect and receive the profits of his real estate and to sell and dispose of his personal property. It does not, however, divest or impair any liens on his property existing before he became chargeable on the district. When Huntingdon became chargeable he had no vested right in this specific property. He had not taken the first step towards acquiring it. He never did acquire it. He was under no more disability at the time he withdrew the claim than when he made it. He did not make it in behalf of the overseers, but in his own right. He could not have been compelled to claim it to the prejudice of his lien creditors, either for the benefit of himself or his other creditors. Before any order or decree giving him the money was made, and before his claim was considered and determined, he withdrew it. He was as competent to withdraw the claim as he was to make it. The withdrawal was no fraud on any of his creditors. It was not in conflict with any principle of equity nor with the policy of the law. No fact is shown tending to put the appellants on higher ground than that occupied by the judgment lien creditors. The learned judge was right in decreeing the money to the latter.

Decree affirmed and appeal dismissed at the cost of the appellants.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Affidavit of defence.—An affidavit of defence should be specific and leave nothing to mere inference.—*Kline v. Fitzsimmons,* (Schuylkill C. P.) 2 Schuyl. L. R. 126.

Decedent's estate.—Charge in land.—A bare direction to devisees to pay money is nothing more than a personal obligation of the devisees. It is not a charge on the land. The Orphans' Court has not jurisdiction to compel devisees of land to have certain legacies charged on the land.—*Walter's Appeal,* 11 Pittsburgh Legal Journal, 456.

Insolvent—Liability of surety.—Under the Insolvent Act of 1836, the sureties of the insolvent are not liable if he attends at the final hearing, surrenders, and is remanded to jail.—*Rowand et ul. v. Smiley et ux.,* 38 Legal Intelligencer 285.

COMMON PLEAS.

C. P. of Carbon Co.

Person v. Weston.

The statute of limitations never extinguishes a debt; it only forms a bar to the remedy to recover it by action.

Where several remedies are given, the party entitled to them may select that which is best calculated to serve his ends.

The act of February 24, 1806, authorizing judgments to be entered by the prothonotary on notes and other instruments, with confession of judgment attached, gives an additional remedy for collection, to which the statute of limitation does not apply.

Where a debt is acknowledged by a debtor under the form of a note, with confession of judgment attached, it may be entered in judgment and collected, notwithstanding more than six years have intervened between the maturity of the note and the entry of judgment upon it.

A refusal or neglect by the prothonotary to enter judgment upon such a note would make him and his sureties in his official bond liable to such holder for any damage accruing in consequence of such refusal or neglect.

Sur rule to strike off judgment.

DREHRER, P. J. The only ground upon which the defendant asks to have the judgment set aside is, that more than six years had elapsed after the maturity of the note before judgment was entered, and therefore the statute of limitations was a bar to a recovery by any action or suit thereon. In other words, we are asked to open the judgment to enable the defendant to plead the statute of limitation.

Had the prothonotary power to enter the judgment? The act of Assembly of 24th February, 1806, provides that "it shall be the duty of the prothonotary of any court of record within this Commonwealth, on the application of any person, being the original holder, or assignee of such holder of a note * * in which judgment is confessed, * * to enter judgment against the persons who executed the same for the amount which, from the face of the instrument, may appear to be due," etc. This act makes it the *duty* of the prothonotary to enter judgment on such a note as the present on application of the holder thereof. A refusal or neglect of the prothonotary to discharge his duty in this regard would make him, and his sureties in his official bond, liable to such holder for any damage accruing in consequence of such refusal or neglect. It may be said that the prothonotary would be justified in refusing to enter the judgment where, as in the present case, the note is not a specialty, and more than six years have elapsed since the maturity of the note; but the answer to this is, that the prothonotary is not the agent of the maker of the note, nor can he know whether the maker will plead the statute of limitations. Suppose the case where a holder of a note like the present one, after the expiration of six years, should apply to the prothonotary to enter judgment thereon, and the prothonotary should refuse on the ground that the statute of limitations would be a bar to recovery in an action of debt or assumpsit on the note, and it should turn out that the maker did not intend to plead the statute, and would not plead it in a subsequent suit, would not the prothonotary be liable to the holder if, in consequence of his refusal to enter judgment the holder lost the money? I am inclined to think the prothonotary would be liable. A defendant may or may not plead the statute of limitation. If he does not plead it, the statute is no bar to a recovery.

The present note is something more than a promissory note. It is also a confession of judgment, and the statute of limitations does not affect the confession. The maker having, in the original contract, confessed a judgment, thereby gave the holder an additional remedy to that by ordinary suit, or action by writ, to recover the debt. The judgment having been properly entered, we will not open it merely that the defendant may plead the statute. This very question was decided in the Court of Common Pleas of Luzerne county in 1874. The opinion of Harding, P. J., may be found in 3 Luz. Leg. Reg. 56; in which he refused to strike off or open a judgment to enable the defendant to plead the statute. I understand the same ruling has been made by the Court of Common Pleas of Bradford county.

Rule to strike off judgment is discharged.

YORK LEGAL RECORD.

VOL. II. THURSDAY, AUGUST 11, 1881. No. 23.

COMMON PLEAS.

C. P. of Dauphin Co.

The Commonwealth of Pennsylvania ex rel. Charles S. Wolfe, vs. Samuel Butler, State Treasurer.

Words Construction of—New Constitution—Meaning of "Salary."

The word "Salary," as used in the Constitution (Art. II; sec. 8) of 1874, is to be accepted in its ordinary and popular sense, and means a fixed sum paid for a term of service.

So much of the Act of May 11, 1874, fixing the compensation of members of the Legislature as provides for a *per diem* compensation in addition to a fixed salary, is unconstitutional.

Writ of mandamus. Application for a peremptory mandamus and answer thereto.

PEARSON, P. J., and HENDERSON, A. L. J.

The pleadings in this case raise a single question. Is the plaintiff, as a member of the Legislature of Pennsylvania, entitled to receive out of the treasury of the State the sum of five hundred dollars in addition to the salary, mileage, etc., already paid him for his services during the session of 1881? That depends on the constitutionality of the first section of the Act of the 11th of May, 1874, making compensation to the members of the General Assembly in these words: "That the compensation of the members of the General Assembly shall be one thousand dollars for each regular and each adjourned annual session, not exceeding one hundred days; and ten dollars *per diem* for time necessarily spent after the expiration of the hundred days; *Provided, however,* that such time shall not exceed fifty days at any one session." Mileage is also provided for, and also adjourned special sessions at the same rate per day. It is conceded that the session of the Legislature of which the plaintiff was a member in attendance continued for one hundred and fifty-eight days, terminating on the 9th day of June, 1881.

The provision of the constitution under which this law was enacted is in these words, as found in section eight of the second article: "The members of the General Assembly shall receive such salary and mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee or otherwise. No member of either House shall, during the term for which he may have been elected, receive an increase of salary or mileage under any law passed during such term."

One main question to be determined is what was meant by the words "salary as shall be fixed by law?" Was it intended to give a salary as generally known and understood, or a *per diem* compensation? Or was it intended to give both a salary and daily pay? Was it to be a fixed lumped sum during one hundred days and compensation at the same rate *per diem* for the next fifty days, or not exceeding that time?

In construing a constitution Courts are perhaps not bound down to the form of words used as in a private article of agreement, or even an act of Assembly. It is a form of government; must be expounded liberally to effect the general object; must be studied in the light of ordinary language and the construction placed upon it by the people: 4 P. F. S. 260, 261; 3 Sergt. & Rawle 69. A constitution is made not particularly for the inspection of lawyers, but for the million, that they may judge of their rights and duties. Words are not to be used in their technical sense, but are to have their plain popular and natural meaning. The State is only bound by their natural meaning; GIBSON, C. J., 6 W. & Sergt. 114. Now what is the plain and natural meaning of the word *"Salary?"* It is a word with which the world—the mass of the people—have become very familiar. We need not look into dictionaries to study its meaning. Not even into law

dictionaries to see how it has been held by the legal profession. It gives us but little light to know that the word was derived from the word "salt"—a necessary of life, in which the wages of the Roman soldier was paid; or from *"sala,"* a hall, or the rent of a hall or *"sala."* How is it understood by the mass of the people in this country at the present? By the English speaking people of the United States in the latter part of the nineteenth century? Webster defines it to be the recompense or consideration stipulated to be paid to a person for services, usually a fixed sum by the year, or for a shorter period.—Richardson defines it in nearly the same language: Services done at certain times or periods. "Wages" usually applied to servants; salaries to superiors. Worcester says: "An annual or periodical payment for services—a stiuplated periodical recompense."

Tomlin in his law dictionary defines it, "a recompense, a consideration made to a person for his pains or industry in another man's business." Bunnell, L. D., "an annual compensation for services rendered, a fixed sum to be paid by the year." Bouvier, L. D., says: "A reward or recompense for services performed. It is usually applied to the reward paid to public officers for the performance of official duties.

If we wish to arrive at what was actually meant by the framers of our present constitution by the section cited, we can gain much information by looking into the registry of their proceedings. In vol. 1, p. 509, we find the section introduced by a committee substantially as adopted. This was voted as an amendment to one in different language. All of the arguments show that the object was to have a fixed salary for the session. An effort was made to amend by striking out *"salary,"*. and inserting *"Compensation."* This was rejected on the ground that a fixed salary for the session was desirable and intended. Again, when the matter was brought up as finally inserted, the proposition to substitute *"compensation,"* as in the former constitutions of 1790 and that of 1838, was proposed, it was again rejected by a vote of the convention. See vol. 7, p. 313. This was not the mere reasoning of a few members, but the solemn vote of the body. The reason given was that daily pay prolonged the sessions.

A legitimate source of reasoning is found in the change from the former language and the inconvenience felt under it in paying by the day to the salary as adopted. The Legislature of 1874 appear in enacting the statute, to have got as far as possible from the language of the constitution in using the word *"compensation"* instead of *"salary,"* and not only fixing a certain sum of $1000 for the hundred days, but also a *per diem* allowance for the residue of the time spent. There was certainly no authority to fix on two distinct modes of payment under the clause in the constitution. We are well aware of the fact that the constitution, as framed, is of no avail until voted on by the people and they may view it in one sense whilst those who framed it intended it in another, but there is no reason to suppose that the same words were intended differently, and to reach the true intent of the instrument is to adhere to the words as nearly as practicable, unless it should cause great inconvenience, or introduce an absurdity. We must not be too literal in our construction, lest we conflict with the maxim, *qui haeret in littera haeret in cortice,* but in the present case we consider the latter the wisest course, and least likely to lead to evil or inconvenience. In construing a constitution we may, with propriety, look into a former instrument of the same general character to see the changes made, and from them judge of what was intended. In doubtful cases we may with propriety examine the debates to see what was actually intended, and into the history of what led to the alteration. The people look into the words used to collect the meaning: 13 Michigan 147-8 to 166. The differ-

ent modes of compensating was considered in Indiana. "It may be fees to sheriffs and certain officers. Wages to laborers; salaries to certain other officers, or persons in other situations;" 10 Indiana 85-6. Again in 12 Ohio State R., p. 617-18. "Salary," compensation to an officer for a fixed time, or it may be the time of service or amount thereof rendered. All of these cases draw the distinction between fees, wages and salary. —Few persons would in the present age confound the three as all meaning the same thing, yet they might all come under the word *"compensation,"* as used by the Legislature, but could not by any possibility under the word *"salary,"* as used by the convention, which carefully avoided and rejected the word *"compensation."* It follows, as we conceive, that so much of the Act of 1874, as fixes a salary for the session of the Legislature is constitutional; that which gives a *per diem* compensation in addition is unconstitutional. The Legislature might have declared that the session should not exceed one hundred and fifty days, but the salary must be fixed, and whether the session lasted twenty days or one hundred and fifty, the salary must be paid. The time and amount were both discretionary, but it could not be salary and daily pay also, on a sliding scale; a salary alone was provided for in the constitution. If that had not been declared, the Legislature would have had an unlimited mode of payment, as under the former constitutions, by the word *"compensation."* By the change of language it is very manifest that a different method of payment was intended, and the object of the change was clearly to avoid a prolongation of the session, or any temptation thereto.

A question has been raised as to whether the Courts can declare an Act of Assembly void in part as violated by the constitution, and valid for the residue. Of that power we have no doubt. Some provisions may be good, others bad, valid under some state of facts, as violative of the rights of individuals, good against others differently situated. This Act of 1874 is constitutional so far as it gives a fixed sum for the session whether by the name of *"salary,"* or by another name; but it cannot give both the compensation by the session and by the day, or by the day alone. We are well aware of the legal principle that the Legislature can do everything consistent with our general frame of government not prohibited by the constitution, and that its power must be liberally construed, whilst the constitution of the United States must receive a strict construction. Congress can do nothing but what is authorized by express words or necessary implication, but can the Legislature entirely depart from the whole scope and meaning of the constitution? A system is pointed out in that instrument. Can the Legislature instead of allowing a salary fix daily pay? That conflicts with the intention and is so far void.

We are all well aware that it is only in a clear case that the Courts can declare an Act of Assembly unconstitutional. It can not be declared unconstitutional unless shown to be clearly so. So decided from 3 Sergt. & Rawle 69, down to 7 Norris 46. This in various words: See 4 Barr 123; 5 Harris 118; 9 Harris 161; Idem 200; Casey 287, 300; Smith 474; 4 Smith 260, 261; 14 Wright 150, 16 Sm. 164 down to 7 Norris 46. A host of other cases might be cited to the same effect. The power and the duty to so declare has never been doubted in any case excepting one by Judge GIBSON, in Eakin *v.* Raub, 12 S. & R. 350, which he afterwards entirely repudiated and lamented having given. The majority of the Court differed with his entirely. We are aware that in constitutional questions great weight is to be given to contemporaneous construction by the Legislature, and that the structure relied on the plaintiff was enacted in 1874, and has been practiced under ever since, as is said, without question. It is very true that its validity has never been judicially questioned, but it was greatly doubted and

denied by Attorney General Lear in a very able opinion presented to us, but in some way the controversy was dropped and never brought before the judiciary, and perhaps not presented to the State Treasurer. It is doubted in the argument whether the Court can, with propriety, look into the debates of the convention, to ascertain the meaning and intention of the convention, but it has been done on several occasions by the supreme judges of the United States, and by those of our Court at an early day, and even as late as one case in 9 W. N. C. 241, in 1880. We are therefore, clearly of opinion that so much of the Act of the 11th of May, 1874, already cited as pretends to give daily pay in addition to a fixed sum, to members of the Legislature, is unconstitutional and void. It would be unlawful for the State treasurer to pay it; this Court cannot enforce payment by *mandamus*, and the same must be refused. We leave out of view every question of policy or expediency. Those are questions for the Legislature alone, over which the judiciary has no control, and no right or disposition to pass judgment.

He was a little lawyer man,
Who meekly blushed while he began
Her poor dead husband's will to scan.

He smiled while thinking of his fee,
Then said to her so tenderly,
"You have a nice fat legacy."

And when he lay next day in bed,
With plasters on his broken head,
He wondered what on earth he said.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Administrator—Liability of—Partnership.—The administrator of a decedent's estate permitted the business in which decedent had been partner to be carried on for several years by decedent's surviving partner. The result of such continuance of business was a profit and an increase in value of firm assets. The firm, however, proved to be insolvent when the business was finally closed, and the real and personal property sold, as in fact it was at the time of decedent's death. Decedent had no other property outside of his interest in the firm. HELD, (reversing the court below), confirming the auditor's report, that there was no reason for surcharging the accountant, he not having adventured or lost in the business any estate, real or personal, of the decedent. The accountant was held entitled to credit for expenses of administration and to his charge of $100 for services.—*Appeal of Joseph Stern*, 11 Pittsburgh Legal Journal 452.

Adultery—Evidence—Declarations of a paramour are not such evidence of adultery on the part of the wife as will justify a decree of divorce.—*Fairchild v. Fairchild*, (Luzerne C. P.) 10 Luzerne Legal Register 179.

Deed of Trust—Revocation of by Will.—A deed of trust containing a power of revocation by the grantor and wife, or the survivor of them, by instrument of writing under their hands and seals, or under the hand and seal of the survivor, attested by two or more subscribing witnesses, is revoked by the last will and testament of the survivor attested by three subscribing witnesses, under seal and duly registered, although it contained no reference to the power.—*Taylor's Appeal*, 38 Legal Intelligencer 286.

YORK LEGAL RECORD.

Vol. II. THURSDAY, AUGUST 18, 1881. No. 24.

COMMON PLEAS.

Nace et al. v. Shreiner.

Married woman—Confession of judgment by—Act of 1855.

A bond with warrant of attorney to confess judgment, accompanying a mortgage, and executed by a married woman whose husband had deserted her a few days prior to its execution, is void, and a Sheriff's sale under a *vend. ex.* issued upon judgment entered thereon passes no title.

In order to bring a married woman whose husband has deserted her within the provisions of the Act of 4 May, 1855, it must be shown that she afterwards transacted business as a *feme sole* trader.

Rule to set aside Sheriff's sale, open judgment and let the defendant into a defence.

Fisher, P. J. In this case a married woman in the absence of her husband, who had left her a few days previously, executed a bond and warrant of attorney waiving the exemption law and stay of execution; a *fi. fa.* was issued and personal property sold on it and a *vend. ex.* afterwards issued, and her real estate was sold on it.

In Dorrance *v.* Scott, 3 Wharton 309, a judgment bond executed by a married woman was held to be not only void but a judgment and sheriff's sale founded on it was held to be also void.

In Caldwell *v.* Waters, 6 Watts 79, a warrant of attorney given by husband and wife and judgment entered thereon against both and sale of wife's real estate under it, was held void in ejectment.

In Gliddon *v.* Strupler, 2 P. F. Smith 400, Agnew, J., in delivering the opinion of the Court, refers to both of these cases with approval.

In Swayne *v.* Lyon, 17 P. F Smith 436, it was held that any judgment against a married woman which does not show her liability on its face, is void, and if void, the fact that she confessed a judgment in open court will not validate it.

The provisions of the Act of 4 May, 1855, § 2, have been invoked to sustain this mortgage, but to do so the defendant must, after the absence of her husband, have transacted business as a *feme sole* trader; Cleaver *v.* Scheetz, 20 P. F. Smith 500; but of this we think there is not sufficient evidence to bring her under the provisions of the Act of 1855.

But, independently of all this, we think the evidence shows that when she gave the bond she was not fully informed of the consequences of what she did, of the liability she incurred, and that there are strong circumstances in the transaction to induce a belief that she was deceived and imposed upon, and that improper representations were made to her to induce her to execute the bond and mortgage to the plaintiff, and that for this reason alone the case ought to be submitted to a jury.

Rule absolute.

Buser v. Buser.

Husband and wife—Judgment of husband to wife—When it will not be set aside.

Where the evidence is clear that the wife had separate property, and that she paid money to her husband at the time the judgment notes were given by him to her, and which were afterwards consolidated into one judgment, such a judgment will not be set aside, nor a feigned issue granted to test its validity.

Rule to show cause why judgment should not be set aside, etc.

Wickes, A. L. J. The evidence clearly establishes that the wife had a separate estate at the time the notes were given by her husband in 1865, 1868, 1869 and 1870, and the evidence further is that she paid her husband money at or about the times these judgment notes were executed by him. The judgment entered to April Term, 1875, was but a consolidation of these amounts, with interest added, as called for by the various notes referred to. Besides which, at the time these notes were given, the husband had no creditors—at least the evidence does not disclose that he had.

We think upon these facts we would not be justified in setting aside this judg-

ment, or in granting a feigned issue to try its validity.

Rule discharged.

Singer Sewing Machine Company v. Wilson.

Married woman—Bond of—Sewing Machine.

A judgment entered against a married woman upon a bond with warrant of attorney executed by her, and given for the payment of a sewing machine, is void, and must be stricken off.

Rule to strike off judgment.

WICKES, A. L. J. It is familiar law that the bond of a married woman either with or without a warrant of attorney to confess judgment thereon, is absolutely void.

But in this case, it is supposed the act approved the 29th February, 1872, P. L. 21, authorizing married women to contract for the purchase of sewing machines for their own use, invests them with power to confess a judgment, because of its broad phraseology. We think this act was not intended to take away any of the safeguards which the law has thrown around a married woman's property.

It confers upon her the right to contract, and her separate estate can doubtless be reached through some appropriate form of action, and made liable for a debt contracted under the provisions of this act, but it nowhere removes her disability to bind herself by a bond.

The judgment in this case having been entered on a warrant of attorney signed by a married woman is void and must be stricken off.

Rule absolute.

Richcreek v. Richcreek and Wife.

Married woman — Judgment confessed by—Certiorari.

A *certiorari* will not lie unless served within five days after it is issued.

A judgment confessed by a married woman is void, and no execution can be issued upon it.

FISHER, P. J. The husband did not appear before the justice but the wife did and confessed judgment against both.—The certiorari in this case was issued on the 23rd of October, 1877, but not served until November 10th, 1877, which was too late to have the proceedings set aside on certiorari, because the 21st Section of the Act of 20th of March, 1810, provides that no proceeding of a justice shall be set aside by certiorari unless the same be issued within 20 days from the rendition of judgment and served within five days after the same was issued; Vide Purdon's Digest, 1873. Title Error and Appeals pg. 608, place 28. For this reason, therefore, certiorari must be quashed.

But notwithstanding the fact that the proceedings cannot be set aside the judgment is void as having been confessed by a married woman and no execution can be isued upon it; Bruner's Appeal, 11 Wright 67. The remedy of the plaintiff is to discontinue the old action and bring a new one setting out the fact that the flour was purchased by the wife for the use of herself, husband and family.

The Court therefore refuses to set aside the proceedings but quashes the certiorari.

Certiorari quashed.

Pollinger v. Farver.

Interest—Commencement of.

Where, through mutual mistake, it was not discovered that money was owing from the defendant to the plaintiff until after the lapse of some time, interest on such sum can only be charged against the defendant from the time he was informed of the existence of such a debt, and a demand made for its payment.

Exceptions to referee's report.

WICKES, A. L. J. The Referee erred in this case in allowing interest to the plaintiff prior to the 8th March, 1877. It was a case of mutual mistake, or mutual forgetfulness, and does not at all fall within the rule which permits interest to be charged where a defendant has withheld the money of the plaintiff unlawfully and against his consent; Brown *v.* Campbell, 1 S. & R. 176, also 1 P. F. Smith 468.

The Referee does not find when a demand was made by plaintiff or whether he ever made a formal demand for the money, but he does find that on the 8th March, 1877, the plaintiff found the check he had given defendant, and that

this first suggested to him that he had never been repaid the money he had advanced. The plaintiff's testimony is, that he at once called defendant's attention to the matter on the 8th March, 1877, and on several occasions, requested him to come down and aid him in getting the money deposited. But from the evidence and the report it is perfectly clear that whatever may have been the defendant's belief as to the repayment of this money prior to March 8, 1877, he was then informed that the plaintiff had not been paid and wanted his money. From that date plaintiff is entitled to interest, and not before.

We therefore recommit the report to the Referee to be amended in accordance with the views expressed in this opinion.

C. P. of Delaware Co.

Myers v. Johnson et. al.

Evidence—Testimony of wife when admissible – Act of April 15, 1869—Principal and surety.

In an action brought against the sureties upon a lost interpleader bond, given by a husband and wife, the wife a competent witness to prove the signatures of the sureties.

The wife's signature to the bond is void; the husband is the principal, not merely surety for his wife; and as her testimony cannot in any event be *against* his interest, the Act of 1869 makes her competent.

Rule for a new trial.

The essential facts in the case are stated in the opinion of the Court.

CLAYTON, P. J. The only reason for a new trial upon which a doubt can be entertained, as to the proper ruling of a court upon the trial of this case, is the alleged error in admitting Ella Lazar, the wife of Simon Lazar, and a joint obligor upon the bond in suit, to testify as a witness.

The allegation of the plaintiff was, that the defendants, Hinkson and Johnson, were sureties upon the bond of Simon Lazar and Ella Lazar in a sheriff's interpleader, where goods had been levied upon as the property of Simon Lazar and had been claimed as the property of Ella Lazar, his wife. The bond could not be found. It was proved that such a bond had been ordered, but the question for the jury was, whether the signatures of the defendants, Hinkson and Johnson, were ever subscribed to the bond. It was proved that the bond had been executed by Simon Lazar, and had been filed. It purported to have been signed by Ella Lazar and the defendants Hinkson and Johnson. They, however, had pleaded *non est factum*. And, as the bond could not be found, it was necessary to prove their signatures. After a great deal of testimony on the subject, the plaintiff called Ella Lazar, to prove that she had signed such a bond, and also to prove its execution by Johnson and Hinkson.

To her testimony the defendants objected, upon the ground that she was the wife of one of the parties to the alleged bond (Simon Lazar), and was called to testify against her husband's interest because the judgment entered on this verdict would be conclusive against him in an action for contribution.

The record in evidence showed that the issue, in the case in which the bond had been given, was decided against the claimant, the said Ella Lazar, upon the ground that the goods claimed by her were, in fact, the goods of her husband, Simon Lazar. Her testimony in the present case tended the same way It must be admitted that at common law, husband and wife could not be witnesses either for or against each other. The wife could not testify *for* her husband because of the identity of interest, and the strong temptation for perjury to please her husband, or win his cause. She could not be permitted to testify *against* him because of public policy, as it might be the cause of implacable discord and dissension between them, and the means of great inconvenience. But even at common law the husband's interest must be direct, not remote or contingent, to exclude the wife as a witness against him. She could be a witness in an action between third persons not immediately affecting the interest of her husband, though her evidence might, possibly, expose him to a legal demand; Phil. on Ev. 87, and Williams

v. Johnson, 1 Strange 504. In all collateral proceedings, not immediately affecting their mutual interests their evidence was receivable, notwithstanding it might tend to subject the other to a legal demand; 1 Gr. Ev. §342. Alban *v.* Pritchett, 6 T. R. 680; Musser *v* Gardner, 16 Smith 247. The cases cited establish this principle, that the wife may be a witness to excuse a party sued from supposed liability, although the effect of her testimony is to charge her husband upon the same debt, in an action afterwards to be brought against him. The reason is, that the verdict, in the action in which she testifies, cannot be used in the action against him, nor can she be called in such an action.

So it may be doubtful, with the weight of authority in favor of the proposition, whether Mrs. Lazar would not have been a competent witness at common law.

Mrs. Lazar's signature to the bond was void. Being a married woman she could not execute such an obligation; Shallcross *v.* Smith, 2 W. N. 435; Warder *v.* Davis. 11 C. 74.

Simon Lazar then was not a surety, but the principal in the bond. In any event he would be liable to indemnify the sureties, if there should be a recovery against them, and if there could be no recovery against them, he was still liable to the plaintiff for the full performance of the bond. This being the case the Act of Assembly of 1869 makes her competent beyond further doubt. The act is too plain to need judicial construction. The wife is now in all cases a witness *for* her husband. or in any case in which he is interested, with the single exception of the case where she is called to testify *against* his interest. This of course does not mean to restrict her common law competency. but to enlarge it, except in cases where she is called to testify against her husband. See Rowley *v.* McHugh, 16 Sm 269. Even if there had been a warranty of title by the husband in the last cited case, the case of Mussar *v.* Gardner, supra, decides that the interest would have been too contingent and remote to bring her within the prohibition of the statute from testifying against her husband.

But if the signature of Ella Lazar to the bond was not void, and if Simon Lazar was her surety, with the defendants in the case, still her testimony was not against his interest. As co-surety he would be liable only for his *pro rata;* it therefore follows that the more sureties made liable, the less will have to be paid by each. It was, therefore, Simon Lazar's interest as surety, that there should be a recovery against Johnson and Hinkson, as in that event he would only be liable for a contribution of one-third of the bond, while if they should escape he would be liable for the whole.

Rule discharged.

Abstracts of Recent Decisions.

Affidavit of defense—Sufficiency of.—An affidavit of defence which alleges that the contract was made in New York and is void by the laws of that state, must state specifically what the laws are. The laws of another State must be proved as facts. An allegation in an affidavit of defense as follows, "The defendant suggests to the Court that under the statute of New York and the decisions thereon, the said notes are usurious and void even in the hands of third parties," is not sufficient.—*Boughton v. The American Exchange National Bank,* 38 Legal Intelligencer 303

Attorney-at-law — Set-off.—*An attorney* at law or in fact employed to collect a claim, when he has received or recovered the money has no right to set off an antecedent debt or claim in his own right against his own constituent—*Simpson v Pinkerton,* 38 Legal Intelligencer 303.

YORK LEGAL RECORD.

VOL. II. THURSDAY, AUGUST 25, 1881. No. 25.

U. S. CIRCUIT COURT.

Brockway v. The Mutual Benefit Life Ins. Co.

Life Insurance—Interest in insured—Creditor—Wager Policy.

As a general rule, no one can insure the life of another, unless he has an interest in that life. A creditor, however, may insure the life of his debtor.

Extract from the charge to the jury by ACHESON, J.

This is an action by Charles B. Brockway, administrator of Beckwith S. Brockway, deceased, for the use of D. F. Seybert, against the Mutual Benefit Life Insurance Company of New Jersey. The suit is upon a policy of insurance, dated March 12, 1868, for the sum of $10,000, issued by the defendant company upon the life of Beckwith S. Brockway, of Salem township, Luzerne county, Pennsylvania. On its face, the policy would seem to have been taken out by Beckwith S. Brockway on his own account. It appears to be an ordinary contract of life insurance between him and the company. By its terms, in consideration of the payment of the cash premium, and the annual premiums therein specified, the company agreed to pay the sum of $10,000 to the executors, administrators, or assigns of Beckwith S. Brockway, within ninety days after due notice and proof of his death, and proof of interest by the party claiming the insurance money.

The plaintiff gave in evidence—

1. A paper dated March 8, 1868, containing the "declaration" of Beckwith S. Brockway, made upon his application for insurance, and certain printed questions propounded by the company, and the written answers thereto made by Brockway, his friend, and his physician, which answers are expressly made "the basis of the contract" between Brockway and the insurance company.

2. The policy of insurance issued by the Mutual Benefit Life Insurance Company in pursuance of that application, the policy containing a receipt for $650, the first premium.

3. A receipt dated March 12, 1869, for $650, the second year's premium.

4. Proof of the death of Beckwith S. Brockway on December 4, 1869.

5. And it was admitted that due proofs of death and interest were furnished the company on December 27, 1869

The plaintiff thus made out a *prima facie* case, which would entitle him to your verdict, in the absence of any defense shown by counter evidence. But the insurance company has set up several defenses, and much evidence bearing thereon has been given. These defenses (so far as submitted to you), and the evidence touching the same, both that on the part of the defense, and that in rebuttal, deserve, and should receive, your careful and dispassionate consideration.

* * *

It is claimed that the policy in suit is known as a wagering policy, and therefore void. It is a general rule of law that no one can procure valid insurance upon a life unless he has an interest in that life. I may insure my own life, for I have an interest in it. But an entire stranger to me, one who has no interest in my life as a creditor or otherwise, can not take out a valid policy on it. Should he procure such policy, the law would condemn it as a mere wager, a bet on my life, a gambling contract, and there could be no recovery thereon. This rule prevails, not in the interest of insurance companies, not out of regard to them. The rule has its foundation in good morals and sound public policy. It has been said of such wager policies, that, "if valid, they would not only afford facilities for a demoralizing system of gaming, but furnish strong temptation to the party interested to bring about, if possible, the event insured against." The annals of crime furnish more than one instance where murder has been perpetrated by the holders of such policies

that they might reap the fruit of speculative insurance upon the life of their victim.' If an entire stranger to me were permitted to take out insurance on my life, his sole interest, you must perceive, would be my speedy death. The law, therefore, wisely takes from him the temptation to bring about the event by forbidding such contract. The evil of gambling in such policies are also apparent and great, and therefore the law will not sanction insurance obtained for the purpose of speculating upon the hazard of a life, in which the assured has no interest.

In the present case, as I have heretofore said, the policy on its face appears to be taken out by Beckwith S. Brockway on his own account. But it is claimed it was not intended to be what it purports, but that form was adopted as a mere cover for a wager policy in favor of Daniel F. Seybert, the use plaintiff in this case.

It appears that Beckwith S. Brockway was a shoemaker, and there is evidence tending to show that he was without pecuniary means. When he died on December 4, 1869, there was on his life insurance to the amount of $40,000, which, it is claimed, was out of all proportion to his station in life. There is evidence tending to show that all this insurance was taken by the procurement of Daniel F. Seybert, and for his benefit; that he (Seybert) paid all the premiums that were paid; that Seybert solicited Brockway to take out the policy in suit, and agreed to pay him $300 for so doing; that he did pay him $30 in cash, and gave him his two notes for $100 each.

The defendant claims that the evidence shows that the policy in suit was taken out nominally for Brockway, but actually for Seybert, as a mere matter of speculation upon the hazard of Brockway's life; that it was not a policy upon the life of Brockway taken out in good faith, but a mere cover for a wager policy. If you so find, there can be no recovery upon the policy, and your verdict must be for the defendant.

A creditor, however, has an insurable interest in the life of his debtor, and may take out a policy upon the life of the latter, or the policy may be taken out in the name of the debtor and assigned to the creditor. It is claimed by Seybert that this is the character of the transaction under investigation. He produces, and has given in evidence, a note dated December 26, 1867, for $10,000, payable to him, or his order, one day after date, and purporting to be signed by Beckwith S. Brockway. He has also given in evidence an assignment dated March 30, 1868, from Brockway to him (Seybert), for $8,000 of the policy in suit.

He claims, you perceive, to be the creditor of Brockway, and that he was such at the time this policy was taken out, and that it was procured on account of that indebtedness. If Brockway was indebted to Seybert, as claimed by him in the sum of $10,000, and the policy was taken out with reference to that indebtedness, then it was not a wager policy, and this branch of the defence (if you so find the facts to be) would fail.

Are you satisfied that there was such indebtedness? The note for $10,000, purporting to be signed by Brockway, is in evidence, but its genuineness is controverted. It is for you to determine, under all the evidence, whether or not the signature to the note is the genuine signature of Beckwith S. Brockway. But if you should find that it is his signature, the vital question still remains whether it represents a *bona fide* indebtedness. Did Brockway actually owe Seybert $10,000? or is this note but a part of the alleged confederacy between Brockway and Seybert, whereby the latter was to take out a merely speculative insurance upon the life of the former?

Upon this branch of the case Seybert relies upon the note itself, and has given no other evidence to show the alleged indebtedness, or how or when it originated. Mrs. Cooper testifies that she was present when the note was signed; but she is silent as to everything beyond the

mere fact of the signing of the note by Brockway. In the absence of any testimony by Mrs. Cooper as to the payment of any money by Seybert to Brockway, or the passing of any consideration at the time the note was executed, it is reasonable to assume that no consideration then passed between the parties. I can not recall any evidence whatever, aside from the note itself, tending to show the alleged indebtedness. The defendant insists that, in view of Brockway's pecuniary circumstances and his station in life, it is highly improbable that he could be *bona fide* indebted to Seybert for so large an amount as $10,000. It is further argued that if any such indebtedness in fact existed, it was in the power of Daniel F. Seybert, the use party plaintiff, to show that indebtedness, to prove the consideration for which the note was given, and that the entire absence of such evidence raises a strong presumption against the *bona fides* of the note. It is for you to say what weight should be given to these considerations, which the defendant's counsel have pressed upon you.

The case, as submitted to the jury, turns upon the determination of two questions of fact. The one relates to the habits of Brockway in respect to sobriety; the other has regard to the character of the policy in suit.

1. Was Beckwith S. Brockway on March 8, 1868, "sober and temperate," and had he always been so?

2. Was the policy in suit a *bona fide* risk upon the life of Brockway, or was it merely a speculative transaction on the part of Seybert—a wagering policy?

If you find *both* these questions of fact in favor of the plaintiff, your verdict will be for the plaintiff. But if your finding upon these questions of fact, or upon *either* of them, is against the plaintiff, your verdict must be for the defendant.

COMMON PLEAS.

Shutt's Estate.

Assignee—Purchaser at his own sale.

It is a well settled principle of law that a trustee cannot make profit out of the trust fund, and that if he does he must account for the profit as trustee; and that if he purchases at his own sale he purchases in trust for those interested in the fund.

Petition for review.

FISHER, P. J. Jacob Miller, the assignee in this case, after executing the trust in part, died, and John M. Miller was appointed by the Court trustee in his place. John M. Miller filed accounts of the trust as executed both by himself and Jacob Miller in his life time; an auditor was appointed to distribute the balances on the accounts which were filed and confirmed *nisi*, and to which report exceptions were filed at the instance of Joseph Shutt, the assignor.

Afterwards a petition was filed, at the instance of Joseph Shutt, for a review of the accounts, upon which a citation was issued, and an answer filed.

The question now to be discussed is, ought the bill of review to be granted?

The testimony in this case is very voluminous, but that of the most importance proves that the real estate assigned was purchased by the original trustee through the agency of a third person, for himself, at the sum of one hundred dollars and fifty cents per acre, with the understanding that thirty acres of it should be retained by the person to whom it had been sold at one hundred and twenty dollars an acre. This agreement was consummated by the contracting parties. Afterwards the original trustee died, but before his decease he devised to his daughter the balance of the land, and ordered her to account for it at one hundred dollars per acre. Thus it seems that he realized one hundred and twenty dollars for thirty acres and obliged his daughter to account for the remainder of the tract at one hundred dollars per acre.

It is a well settled principle of law that a trustee cannot make profit out of the trust fund, and that if he does he must account for the profits as trustee; and if he purchases at his own sale he purchases in trust for those interested in the fund; Sawyer's Appeal, 5 Barr 377; Brewer's Appeal, 7 Barr 333; Shuman's Appeal, 3 Casey 64; Campbell *v.* McLain, 1 P. F. Smith 203. From these authorities we infer that Mr. Miller held in trust for the estate of Joseph Shutt, and must account for the profit made from the transaction. Taking as the value of the property the thirty acres at one hundred and twenty dollars per acre, and the balance at one hundred dollars per acre, the value he put upon it in his will, he ought to be surcharged with what remains, with interest from the time the report of the auditor would have become final, had no exceptions been filed.

The profit made on the thirty acres was at the rate of $19.50 per acre, making the sum of $585, on which he ought to be charged interest from the time the auditor's report of distribution would have become absolute had not exceptions been filed, to this day, amounting to $146.34.—We think the surcharge ought to be $731.34.

The petition for a review is granted, and the Court surcharges the estate of Jacob Miller, deceased, with the sum of $731.34.

Hoffacker v. Hoffacker.

Wages — Preferred claim — Notice to Sheriff.

The notice to the Sheriff required by the Act of 9 April, 1872, must refer to the property to be sold, and claim a lien thereon. A bare memorandum of the amount due and the nature of the services rendered is not sufficient.

Such notice must be served on the Sheriff before the sale.

Rule to pay over, etc.

WICKES, A. L. J. The plaintiffs in the above *fi. fa.'s* obtained a rule upon the Sheriff to show cause why the sum of money realized on the above execution should not be paid to the plaintiffs in the above fi. fa.'s according to the lien of their respective claims.

The Sheriff, in his answer, admits that the money realized is in his hands, and states that his only reason for not paying over the whole amount, after deducting costs, is because Peter Bortner and Thomas Shearer gave notice to him in writing, after the sale was made, that the defendant in the writs owed them certain amounts of money for wages, which it is claimed are entitled to a preference over the lien creditors, under the provisions of the Act of 9 April, 1872.

We think these claims are not entitled to a priority in this case.

In the first place, the notices served upon the Sheriff are not sufficient; they are but memoranda of amounts due for labor upon defendant's farm, sworn to, it is true, but they do not refer to the property sold, or claim any lien thereon. They are not, therefore, in such form as requires the Sheriff to take notice of them; McMillen *v.* First National Bank, 1 W. N. C. 55.

In the second place, these notices were not served upon the Sheriff until *after the sale,* when it is the evident intention of the Act that such notice shall be given before the sale, and for the very obvious reason that the Sheriff can sell enough to satisfy all the claims in his hands, and not deprive the lien creditor of the fruits of his execution, *pro tanto* the amount of wages claimed. In such a case it would be quite possible for a subsequent execution creditor to step in and sweep the estate, leaving the claim of the first execution creditor unsatisfied. We therefore think the notice was served too late to entitle the claimants for wages to any preference over the plaintiffs in the *fi. fa.'s.*

Rule absolute.

YORK LEGAL RECORD.

VOL. II. THURSDAY, SEPTEMBER 1, 1881. No. 26.

ORPHANS' COURT.

Haney's Estate.

Decedent's estate—Claim against—Uncle and Nephew—Express promise—Statute of Limitations.

The claimant, when only five years old, was received by his uncle into his family, and supported and educated by him. He remained with his uncle until after he became of age, and was paid for all work done after he attained his majority. The claimant alleged that when he was fourteen years old he wanted to learn a trade, whereupon his uncle told him "that if he would stay with him he would give him more than his trade would ever be worth to him." Almost twenty years after this alleged promise, the uncle died, whereupon the claimant presented his claim before the Auditor for wages for services rendered in the interval between the making of the alleged promise, and the time he attained his majority, which claim was allowed by the Auditor. HELD that the relation existing between the decedent and the claimant forbids any implied promise to pay for the services rendered; the claim lacked the element of certainty which is essential to a recovery; and was barred by the Statute of Limitations.

A promise made by the decedent to a third person "that if Levi would stay with him he would give him more than his trade would ever be worth to him," although afterward communicated to Levi, is not such an express and certain promise to pay as the law requires in cases of this nature.

To revive a claim barred by the Statute of Limitations there must be a clear and definite acknowledgement of the debt, a specification of the amount due, and an unequivocal promise to pay.

Exceptions to Auditor's report.

WICKES, A. L. J. The claim of Levi Haney, which the auditor allowed in part, against the estate of Andrew Haney his uncle, ought not to have been recognized for a moment, because it lacks every element necessary to give it a legal existence. The auditor asserts that its *justness* has not been seriously questioned—we can only say, that in the argument before us, its justness has been very seriously questioned—it is disputed as without foundation in fact or in law.

What is this claim?

A child when only five years old is received by his uncle into his family, and from that time on the uncle stands *in loco parentis* towards him, the minor is supported and reared in this family, and to some extent educated. There he remained until a year or two after he became of age, and was paid by his uncle for all the work he did after his majority. Sixteen or seventeen years after he left we hear for the first time of a claim he has for wages due him for services rendered during his minority, and the foundation of this claim is, that when the minor was fourteen years old and wanted to learn a trade, his uncle told him "that if he would stay he would give him more than his trade would ever be worth to him." Apart from the bar of the Statute of Limitations, which is chiefly relied upon by counsel to defeat this claim, a contract like this never could have been enforced, it is void because of its uncertainty. The relation between these parties, uncle and nephew, forbids the idea of an implied contract.

Said Thompson, C. J. in Neal's administrators *v.* Neal, 9 P. F. S. 349, "There is a well defined line of decision in this commonwealth, to the effect that when a family relation exists, for instance between father and son, or grandson, or uncle and nephew, or even more remotely, no implied promise to pay for services rendered in such relation between the parties arises. In such case a contract or express promise to pay for services must be established in order to enable the claimant to recover and the evidence ought to be clear and satisfactory, otherwise the service will be referred to the relationship." Hence before a recovery can be had there must be clear and satisfactory evidence of an express promise to pay. The express promise relied upon here was the language already referred to, "that if Levi would stay with him he would give him more than his trade would ever be worth to him" and this not said to Levi, but the witness testifies afterwards communicated to Levi by himself.

There never was a time, during the twenty-five years that elapsed between the termination of the relations of these parties and the death of Andrew Haney, when this contract could have been enforced. It lacks that element of certainty which is essential.

Who can undertake to say what a trade if acquired. will be worth to a man?

what was the trade to be, and what the standard by which to measure its pecuniary results? In Sherman *v.* Kitsmiller, 17 S. & R. 45, the promise was, that in consideration that the plaintiff would live with the intestate till her marriage, he would give her one hundred acres of land, held that the promise was void for uncertainty.

In Graham *v.* Graham's Executors, 10 Casey 475, the promise was to give the plaintiff "as much as to any relative on earth," held too indefinite to be enforced against the executors of the promissor. —Said Judge Strong in delivering the opinion of the Court, "the temptation to set up claims against the estates of decedents, particularly such decedents as have left no lineal heirs, is very great. It cannot be doubted that many such claims have been asserted, which would never have been known, had it been possible for the decedent to meet his alleged creditor in a Court of Justice. Not unfrequently, we witness a scramble for a dead man's effects, disreputable to those engaged in it, and shocking to the moral sense of the community Such claims are always dangerous, and when they rest upon parol evidence, they should be strictly scanned."

Is the promise to give "one hundred acres of land" or "as much as to any relative on earth," a whit more indefinite and uncertain, than a promise to give "as much as a trade will be worth"?

In Thompson *v.* Stevens, 21 P. F. S. 162, the promise was to "provide and give her full and plenty after he was gone so that she need not work," this was held, by a divided court, sufficiently definite because *id certum est quod certum reddi potest,* and the measure of the amount was what would keep her without work, taking into consideration her condition in life.

But how is it possible to apply the maxim to the promise in the case before us?

We are clearly of opinion that a recovery could never have been had upon this contract, but without pressing its insufficiency further, what is there in the evidence which removes the bar of the Statute of Limitations?

There is evidence that the uncle from time to time talked to various people about this claim his nephew made or rather spoke of his nephew's dissatisfaction, and of what he intended to give him, intimating also on several occasions that he intended to make provision for Levi in his will, but these were mere loose conversations with strangers to the transaction, not made with Levi or any agent of his, and hence not evidence which the law permits to operate upon the bar of the statute; 5 Harris 302; 8 Casey 510; 3 Wend. 479.

Even admitting the widow's testimony to be competent, and we think it was properly received, it proves nothing which changes the complexion of the case.—When her husband was ill in 1870, she sent for Levi to come, and as she passed through the room, she heard her husband say to him, "I will give you this note of Flinchbaugh's for $179, which is all I will give you to the amount of $400. I will give you the mare in the fall of the year."

Is this the language of a gift, or an indebtedness? Is there one word in it which identifies a claim for wages and clearly admits the whole to be due, that the decedent had neither set off nor payment in part to plead, or any other defence to make to it? Give him this for what? In consideration of services rendered twenty years before, and for which no claim had been preferred? Are we to collect all these necessary facts, from the loose conversations the decedent had with other persons?

That clear and satisfactory evidence required to establish a claim of this character, and that equally clear and satisfactory evidence necessary to rescue a claim of such antiquity from the operation of the Statute of Limitations, cannot be eked out by such a process as is here suggested.

In Miller *v.* Baschore, 2 Nor. 358, it was held that to revive a claim barred by the Statute of Limitations there must be a clear and definite acknowledgment of the debt, a specification of the amount due, and an unequivocal promise to pay.

Where is the acknowledgment of a debt in this case? where the unequivocal promise to pay a debt? Again, the auditor has almost ignored the remainder of the widow's testimony, that her husband always said that he always paid Levi when he was done work; said this before and after he was sick, which means before and after the conversation she testifies to between them, and upon which the auditor bases his award.

The auditor says this is "immaterial, and does not affect the promise to pay." It strikes us as most material. It is a denial of the very claim in controversy. There could be no demand for anything but wages, and "wages" is the very thing this decedent repeatedly told his wife he had always paid his nephew when his work was done.

It really sounds like the argument of counsel, employed to make "the worse appear the better reason," to call the first part of this testimony evidence of a "compromise between the parties," upon which an award can and has been founded, and then allude to the latter part of it as "immaterial," and not affecting "the promise to pay."

We are not unmindful of the full effect of an auditor's finding of the facts; but when he magnifies such evidence as this into undue importance, and permits inferences to avail where facts alone will fill the requirements of the law, calls important evidence immaterial, and overlooks the plain principles of law in measuring the value of the testimony, it is not only our right, but our clear duty, to interfere and prevent such flagrant injustice.

There is no room for *inference* in a case of this character. The proof must be full, complete, clear and satisfactory, first, to prove the contract, and second, to relieve the bar of the statute, and not made up of shreds and patches of evidence, as in this case.

We are therefore of opinion that the Auditor erred in allowing any part of this claim; that the relations existing between the parties, and the circumstances under which they lived together, equally forbid any implied promise to pay; that the evidence does not establish such an express promise as could ever have availed the claimant in an action at law; and that even had such a contract relation existed, the bar of the Statute of Limitations would be an insuperable obstacle to a recovery, there being no evidence which at all rises to the measure of proof necessary to give new life to a claim which for nearly twenty years had never been heard of.

The report is recommitted to the Auditor, with instructions to make distribution of the balance found by him, in accordance with this opinion.

SUPREME COURT.

Wilson's Executor's v. Gordinier.

Judgment—Guaranty of—Instalments.

A. held a judgment against C., payable in ten annual instalments; he assigned it to B., and guaranteed "the same good and collectable when due." HELD, that B.'s extension of the time to C. as to the third and fourth instalments did not *ipso facto* impair A.'s obligation as to the subsequent instalments.

Error to the Court of Common Pleas of Wyoming county.

STERRETT, J. The defendant held a judgment against Miller for $2750, payable in ten annual installments, running from January 1, 1872, to January 1, 1881, inclusive, which he assigned to Dr. Wilson, the plaintiff's testator, and guaranteed "the same good and collectable when due." The declaration on that paper, after reciting the ownership assignment and guaranty of the judgment, avers in due form the insolvency of Miller, the defendant therein, and the consequent liability of the guarantor, defendant in this case. The reasons upon which the motion for compulsory non-suit was

grounded are, that the plaintiffs failed to show any consideration for the alleged guaranty, and that by giving further time to Miller, the defendant in the judgment, on two of the installments thereof, Gordinier, the defendant in this suit, was discharged from liability. The question then is whether the defendant was entitled to judgment of non-suit on either or both of these grounds. As to the first, we think he was not, for the reason that there was testimony from which the jury would have been warranted in finding that the consideration of the assignment and guaranty of the judgment was the conveyance of Dr. Wilson's right, title and interest in certain real estate, known as the Colins property, described in the sheriff's deed. That deed was given in evidence in connection with Wilson's deed to Gordinier, endorsed thereon, and bearing even date with the assignment of the judgment.— The witness, Stevens, testified that defendant "said he had signed over some judgments to Dr. Wilson, in payment of the Colins property that Wilson had bid off at the sheriff's sale, and the title had failed to the house that Bittings claimed, and therefore he did not mean to pay the debt," etc. And, in answer to the question, "did he say what judgment it was that he had assigned?" the witness replied, "It was a judgment he took from Miller for his Peirceville property." There was other testmony tending to show that the judgment was assigned in payment of Wilson's interest in the Colins property, so that, viewing the testimony as a whole, there was ample evidence bearing on the question of consideration to carry the case to the jury. It is true there was no positive testimony that the defendant's admission related specially to the judgment involved in this suit, but it was for the jury to say what he meant, and, inasmuch as there was no evidence of any other judgment to which his statement could apply, the inference claimed by the plaintiffs would not be unwarranted. The motion for non-suit, like a demurrer to evidence, admits every fact which the testimony fairly tends to prove, and the plaintiffs were therefore entitled to every inference of fact which the jury might reasonably draw therefrom. It follows that the judgment of non-suit cannot be sustained on the ground that there was no consideration to support the contract of guaranty. Nor do we think it can be sustained on the other ground that a year's time was given to Miller on the third and fourth instalments. If the plaintiffs were claiming to recover the amount of those instalments in this suit, the defense interposed would no doubt be available to that extent. It cannot be questioned that any valid and binding agreement, by which the surety is prevented from paying the debt at maturity, and asserting his equitable right to subrogation to the original rights and remedies of the creditor, if made without the assent of the surety, will discharge him, but the principle is not applicable to the facts of this case. The two instalments on which an extension of time was given form no part of the plaintiff's claim, for the reason that they were fully paid out of the proceeds of Miller's real estate sold by the sheriff. The judgment, as we have seen, was payable in ten annual instalments, each separate and distinct from the others, and should therefore be treated as a divisible contract. Each instalment was a separate and independent demand, and the extension of time as to the third and fourth would not *ipso facto* impair the guarantor's obligation as to the subsequent instalments; 5 Wait's Actions and Defences 241; Dacker *v.* Rapp, 67 N. Y. Rep. 464.

In any view that can reasonably be taken of the plaintiffs' testimony in support of the claim set out in their declaration, the case should have been submitted to the jury.

Judgment reversed, and a *procedendo* awarded.

YORK LEGAL RECORD.

VOL. II. THURSDAY, SEPT. 8, 1881. No. 27.

QUARTER SESSIONS.

In re Pine Street.

Streets—Order to lay out—Assessment for contribution—Power of Borough authorities.

An order to lay out a street in the Borough of York that fails to give the viewers authority to assess contributions for damages upon property benefitted by the opening, is irregular and void.

The Borough authorities of the Borough of York have the power to lay out streets in said Borough, in accordance with the second section of the Act of 3 April, 1851.

Exceptions to the report of viewers to extend Pine street.*

WICKES, A. L. J. The exception which is fatal to this proceeding arises from issuing an order purporting to be the order of Court, never asked for by the petitioners, or authorized by the Court.

The printed form of order issued under the Act of 1860, relating to roads and bridges in the county of York, has nothing whatever to do with a proceeding under the Act of 1856, to lay out a street; that order imposes a great many duties upon the viewers wholly irrelevant to the proceeding before us. These, while presenting a very singular record, might perhaps be treated as surplusage; but it omits entirely to give the viewers power to make assessments for contribution upon property benefited by the opening, widening, or extension of the street. This is precisely what the viewers in this case did, and precisely what they had no authority to do, under the order issued to them.

The third exception brings this question fairly before us, and it is not necessary to notice the others. It way, however, be proper to notice one matter that was pressed on the argument of this case, because it may embarrass a future proceeding to open this street.†

It was argued that the Borough authorities have no power to lay out streets except in accordance with the requirements of the 3rd Article of the 27th section of the Act approved the 3rd day of April, 1851, P. L. 326. This is a mistake. The only section of that Act ever made a supplement to the charter of the Borough of York is the second section, and that was done by the Act approved the 20th day of April, 1854. The second section of the Act of 1851, expressly authorizes the corporate officers "to survey, lay out, enact, and ordain such roads, streets, lanes, alleys, courts and common sewers, as they may deem necessary," and the Act of 1856 prescribes the method by which they may carry this power into execution.

But for the reason above stated, the report in this case must be set aside.

*This attempt to extend Pine Street was made prior to In re Pine Street, 1 YORK LEGAL RECORD 133; Extension of Pine Street, ib. 21; and In re Pine Street, *ante* 5 and 49.

†This very question was afterwards raised, and decided at length in In re Pine Street, *ante* 5, which decision was affirmed by the Supreme Court in In re Pine Street, *ante* 49.

COMMON PLEAS.

In re Henry Graybill.

Proceeding in Lunacy—Costs of—Payment of.

In order to enable the respondent in an inquisition *de lunatico inquirendo* to avoid the payment out of his estate of the costs of the inquisition, the proper method is to move the Court to quash the *venire* and dismiss the inquisition.

The petition for the inquest having been supported by only one affidavit, and five out of the six jurors having found that the respondent is not a lunatic, makes it a proper case for the Court to exercise its discretion and divide the costs.

Exceptions to inquisition, and motion for order for payment of costs out of respondent's estate.

WICKES, A. L. J. We think the respondent in this case mistook his remedy if he wished to avoid payment of any part of the costs of this inquisition. The Commissioner was powerless to help him. He ought, instead of appearing before him and protesting, and yet proceeding with his defence, to have moved the Court promptly to quash the venire, and dismiss the petition. This course would have saved a large part of the costs subsequently incurred. Court was in session on the very day the parties met for

the purposes of this inquisition, and was also in session a large part of the interval before the final hearing in October.

But it does not by any means follow that all these costs are to be paid out of respondent's estate. It is conceded that the proceeding was irregular and defective, because the petition was supported by but one affidavit, when the Act of 1836 requires more. Besides which, five of the six persons summoned upon this inquest found that the respondent is not a lunatic. It seems, therefore, to present a case in which we may very properly exercise the power given by the Act of Assembly, and apportion among the parties in interest the costs incurred in the issuing and execution of this commission.

The Court order and decree that the petitioner and respondent do each pay the legal fees and mileage of such witnesses as each produced before the Commissioner, and that the remaining costs be divided in equal parts between them.

C. P. of Delaware Co.

Boyer v. Smith, Trustee.

Remainders, Vested and Contingent—Will, Construction of—Meaning of the word Vest in a Will.

A remainder is vested at any time when it is capable of taking immediate effect in possession if the particular estate should cease.

It is the present capacity of taking immediate possession if the life tenant were dead, and not the certainty of outliving him, that makes a remainder vested.

A testator devised his real estate to his six daughters for life, and "at the death of my said daughters or any of them, the share of said daughter or daughters to go and be vested in the child or children of said daughter or daughters respectively, in fee simple, to be equally divided between the children of my said daughters as tenants in common." He then provided for the appointment of commissioners to report partition among his six daughters, and concluded as follows: "Which report when so made shall vest in severalty in each and every of my said daughters and their respective children the purpart and share of my real estate to be so chosen by said daughters." HELD, that the grandchildren took vested remainders in fee.

Case stated, in which Frederick A. Boyer and Mary G., his wife, in right of said Mary G. Boyer, were plaintiffs, and A. Lewis Smith, Trustee, was defendant.

From the case stated it appeared that one Dennis Kelly, who died in 1863, devised his real estate to his six daughters for life and appointed commissioners to make a partition of the land among the six daughters. At the death of any of the daughters her share was to go to and be vested in her child or children in fee simple.

By the partition made under this will a factory property in Haverford township was allotted to Sarah O'Conner one of the daughters.

At the time of Dennis Kelly's death Sarah O'Conner had seven children living, viz: William, Dennis, Roderick, Frederick, Charles, Mary G. Boyer (the plaintiff) and Sallie Whipple.

During their mother's lifetime William, Dennis and Roderick died, the first two intestate and unmarried. Roderick, by his will, devised and bequeathed all his property to his mother absolutely.

Sarah O'Conner afterward died and by her will devised and bequeathed all her property to her children, Frederick O'Conner, Charles O'Conner and Sallie Whipple.

Frederick afterward sold all his estate and interest in the said factory property to his brother Charles, and subsequently Charles O'Conner, Frederick A. Boyer and Mary G., his wife, and John C. Whipple and Sallie, his wife, sold the same to George Callaghan.

By agreement of the parties the sum of $620.64 of the purchase money was placed in the hands of A. Lewis Smith in trust to pay the same to Mary G. Boyer, in case it should be decided that she was the owner of one undivided fourth part of the real estate so sold to Geo. Callaghan, in which case judgment was to be entered for the said sum, with costs. But if it should be decided that the said Mary G. Boyer, at the time of the said sale, was the owner of only three undivided fifteenths of said real estate, then judgment to be entered for defendant to the use of the said Charles O'Conner as to two-thirds of said sum of $620.64 and to the use of the said Sallie Whipple as to the other third, with costs.

The opinion of the Court was rendered May 3, 1880.

CLAYTON, P. J. By the will of Dennis Kelly, dec'd, all his real estate was devised to his six daughters for life with remainder in fee to their children. The language of the devisee is as follows: "At the death of my said daughter or any of them the share of said daughter or daughters to go to and be vested in the child or children of said daughter or daughters respectively, in fee simple, to be equally divided between the children of my said daughters as tenants in common."

The will then provides for the appointment of Commissioners to report partition and closes the devise with these words: "Which report when so made, (referring to the report of the commissioners to make partition,) shall vest in severalty in each and every of my said daughters and their respective children the purpart and share of my real estate to be so chosen by said daughters." The question for the court is, whether the children of the testator's daughters took a *vested* or *contingent* remainder. If they took a *vested* remainder, then the children who died before their mother, could lawfully devise their interest in the land in which their mothers were the life tenants, and the share of those who died intestate would descend to their heirs under the intestate laws of the State. If, however, they only took a *contingent* remainder, then they had no estate which they could lawfully either sell or will, and, at their respective deaths, the fee remained in the surviving children and vested on their mother's death, in those of the children who chanced to be then living, and this whether the deceased child left issue or not. If the testator's intention can be gathered from his expressions in the will, it will, of course, rule the question.

It will be observed that the word *vest* has been twice used in the will. The word has three meanings. In its ordinary sense it signifies to *clothe*, to *dress*, to *robe*, to *cover*. When used in wills it means, 1st, to give a fixed, immediate right of present possession; 2d, to give a fixed immediate right to future enjoyment. Ferne on Rem. 2; 5 Ves. 511. The testator has used it in both senses. He first uses the word to express his intention that the estate devised to his grandchildren shall come to their actual *possession* upon the death of their respective mothers, and not before. The second use of the word is to express his intention that their right to future enjoyment shall be complete upon the making of the report of partition by the commissioners. He declares that upon such report being made his real estate so devised "shall vest in severalty in each and every of my said daughters and their *respective children.*" I am of opinion that it sufficiently appears from the whole will that the testator's intention was to give a life estate to each of his daughters and a vested remainder in fee to each of their said children. This construction is predicted upon the favor the law shows to a vested estate. No remainder will be construed to be contingent, which may, consistently with the intention, be deemed vested; 4 Kent 202.

Wherever the right to future enjoyment is fixed, that is to say, wherever there is a person in *being* who would have an immediate right to possession upon the ceasing of the precedent estate, the remainder is vested; 4 Kent 202. The remainder is not contingent, merely because it is uncertain whether the possession will ever be enjoyed by the remainderman.—Every remainderman may die without enjoying the possession of the estate. It is the present capacity of taking immediate possession if the life tenant were dead, and not the uncertainy of outliving him, that makes the remainder vested; Williamson *v.* Feld, 2 Sandford's Ch. Rep. 533.

There are several reasons for the favor with which the law looks on a vested, in preference to a contingent, remainder. One is the power the particular tenant has to defeat the remainder by suffering

a fine or common recovery. Another is the manifest justice of giving the enjoyment of the estate to the person indicated by the testator. If he may not enjoy the *possession* during his life, he can at least sell his estate, or if he should happen to die intestate during the continuance of the particular estate, his heirs may enjoy his right after him.

Judgment for defendant on the case stated.

C. P. of Chester Co.

Yerger v. Griffith.

Appeal from award of arbitrators — Omission of "firmly"—Amendment.

An affidavit in an appeal from an award of arbitrators which omits the word "firmly," prescribed by the Act of 16 June, 1836, § 27, P. L. 723. Purd. Dig. 85, pl. 56, is clearly defective, and cannot be amended after the time for appeal has passed.

Rule to show cause why the appeal from the award of arbitrators shall not be stricken off.

Summons Case, in which Wm. D. Yerger was plaintiff and John Griffith defendant. The case was referred to arbitrators, who filed an award July 15, 1878, in favor of the plaintiff, in the sum of $19.50. July 31, 1878, the defendant appealed and filed an affidavit, in which he alleged "that the appeal was not taken for the purpose of delay, but because he believed that injustice had been done him." The plaintiff took this rule August 20, 1878.

BUTLER, P. J. The affidavit is clearly defective, in that it omits the word "firmly," prescribed by the statute. Thompson *v.* White (4 S. & R. 135) determines this. Proper *v.* Luce (3 P. & W. 65) determines that this defect cannot be cured by the amendment, after the time for the appeal has passed.

The rule must therefore be made absolute.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Corporation—Dissolution of—Fraudulent representations. — When parties fraudulently represent that the entire stock and assets of a corporation belong to them, whereby they procure the decree of a court dissolving such corporation and acquire possession of its assets, they are liable in equity to be decreed trustees *ex maleficio* as respects a *bona fide* stockholder.—*Bailey's Appeal,* 12 Pittsburgh Legal Journal 23.

Decedent's estate—Exemption—Minor children of a widow.—The children of a widow residing with their mother at the time of her death are entitled to the exemption of three hundred dollars allowed by the Act of April 14th, 1851, although only one of the children was a minor.—*Kelly's Estate,* (Luzere O. C.) 13 Lan-Lancaster Barr 55.

Insurance—Increase of risk—Avoidance of policy.—Where a policy of insurance contained a provision that an increase of the risk, without the written consent of the secretary, would avoid the policy, it was held that plaintiff could not recover where the risk was afterwards increased, without the consent of the secretary; even though at the time the insurance was affected, the agent was informed of the contemplated change, and actually did charge a higher premium on that account.—*Pottsville Mutual Fire Insurance Co. v. Horan,* 12 Pittsburgh Legal Journal 24.

Warranty — Representations. — In a purchase on inspection, and in the absence of fraud, the mere recommendation of the vendor will not amount to a warranty.—The jury must be satisfied that the vendor actually, and not constructively, consented to be bound for the truth of his representations.—*Welles v. Oakley,* (Luzerne C. P.) 10 Luzerne Legal Register 204.

YORK LEGAL RECORD.

VOL. II. THURSDAY, SEPT. 15, 1881. No. 28.

COMMON PLEAS.

Dosch v. Strayer.

Justice of the Peace—Record of—Qui tam action—Act of Assembly.

In a proceeding to recover the penalty imposed by the Act of 13 June, 1836, Sec. 70, for wilfully riding, driving or leading a horse faster than a walk across a wooden bridge having an arch of the span of forty-five feet or upwards, (and extended to iron bridges by the Act of 18 March, 1864,) the Act must be specifically set forth in the proceedings.

It must also appear, on the face of the proceedings, that the notice required by the 63d Section of the Act of 13 June 1836, and the 1st section of the Act of 18 March, 1864, was placed upon the bridge on which the alleged offense was committed.

Certiorari to Solomon Myers, Esq.

The information in this case was as follows:

STATE OF PENNSYLVANIA, }
COUNTY OF YORK, } SS.

On this 17th day of November, A. D. 1877, before me, Solomon Myers, one of the Justices of the Peace, in and for said county, personally came George Dosch, of the Borough of York aforesaid, who, being by me duly sworn according to law, says that Lewis Strayer, of the Borough of York, aforesaid, did wilfully ride, drive or lead, or cause another person to ride, drive or lead a horse faster than a walk, when crossing the Iron Bridge built over the Codorus Creek on West Main Street, in the Borough of York, and in the county of York, aforesaid, (being a bridge having an arch of the length or space of forty-five feet or upwards,) on the third day of November, A. D. 1877.

GEORGE DOSCH.

Upon this information, the following summons was issued:

YORK COUNTY, SS.

To Henry Berry, Constable of the 5th Ward, York, Pa., or to the next constable of Borough, most convenient to the defendant's, greeting: You are hereby commanded to summon Lewis Strayer to appear before me, one of the Justices of the Peace, in and for said County, on the 24th day of November, A. D. 1877, between 1 and 2 o'clock P. M., to answer the Commonwealth of Pennsylvania, at the instance of George Dosch, in a plea of debt for a penalty, not exceeding One Hundred Dollars. Herein fail not.

Witness the hand and seal of the said Justice, at 9th Ward, York Borough, the 17th day of November, A. D. 1877.

SOLOMON MYERS, J. P.

The Justice's proceedings were as follows:

Summons in debt for penalty under act of Assembly, not exceeding $100. Suit is brought in the name of the Commonwealth, at the instance of George Dosch, to recover of the defendant, the penalty of fine, under the act of Assembly of Pennsylvania, for wilfully riding, driving or leading or cause another person to ride, drive, or lead a horse faster than a walk crossing the Iron Bridge, built over the Codorus creek on West Main street, in the borough of York, in York county, Pennsylvania, being a bridge having an arch of the length of forty-five feet or upwards, on the third day of November, A. D. 1877. Summons issued to Henry Berry, constable, returnable Nov. 24, A. D. 1877, between 1 and 2 o'clock P. M. "Served Nov. 17, 1877, by producing the original summons to the defendant, and informing him of the contents thereof," on oath of the constable.

November 24, A. D. 1877. And now to wit, Lewis Strayer the defendant appears before me, and George Dosch appears before me at half past one o'clock P. M. Whereupon I proceed to examine into the truth of said complaint, in the presence of George Dosch and Lewis Strayer aforesaid.

[Here follows a summary of the evidence.]

All the evidence being heard, judgment deferred to December 1st, 1877, at two o'clock P. M. And now to wit, Dec. 1st, 1877. It appears to me, said Justice, that the said Lewis Strayer is guilty of

the premises charged upon him by said information. It is therefore adjudged by me, the said Justice, that the said Lewis Strayer, according to the form of the act of Assembly aforesaid, be convicted, and he is accordingly convicted of the offense charged upon him by the said information. And I do hereby adjudge, that the said Lewis Strayer for the said offense, hath forfeited the sum of five dollars lawful money, to be distributed as the act of general Assembly aforesaid, doth direct. In witness whereof I, the said Justice to this present record of conviction have set my hand and seal at 9th ward in the Borough of York, in the said county, this first day of December, A. D. 1877.

SOLOMON MEYERS, J. P.

G. W. McElroy for exceptions.

W. H. Kain, contra.

WICKES, A. L. J. This proceeding is irregular upon its face. It is in form and substance a qui tam action and yet the act of Assembly is not specified with the accuracy necessary in a proceeding of this character. Nor does it appear affirmatively on the face of the record that the notice required by law was placed upon the bridge over which, it is alleged defendant drove at an improper speed. We think for both reasons the proceedings are defective and must be set aside.

Stirckhouser's Estate.

Set-off—Agreement to pay—Mutuality of claims.

S. made an assignment to one of his creditors, for the benefit of all of his creditors. Afterwards, at the sale of the assigned property, he purchased articles to the amount of $202.08. He was employed by the assignee to manage the estate, and claimed $298.24 as compensation for his services. He presented his claim to the assignee, and they agreed in writing that S.'s claim should not be objected to by the assignee before the Auditor, and that of this amount the assignee should retail $202.08 in payment of himself as assignee, and pay the balance to S. HELD, that this agreement did not prevent the assignee from retaining the balance as part payment of his individual claim against S.

Rule to show cause why the money awarded to Peter Strickhouser should not be paid to him.

The facts are sufficiently stated in the Court's opinion.

WICKES, A. L. J. Peter Strickhouser, who executed a deed of assignment for the benefit of his creditors, to George F. Bare, has presented his petition to the Court, praying for a rule on the said assignee to show cause why he should not pay over to him the assignor, the sum of $96.16, awarded to him by the auditor, appointed to distribute the estate among those entitled to receive it.

Bare was a creditor of Strickhouser, and received a pro rata distribution out of the estate, leaving however a balance still due him, very much in excess of the sum of money awarded to Strickhouser by the auditor.

Strickhouser was employed by Bare in the management of the trust estate, and the item in the auditor's account is "deduct claim of Peter Strickhouser" for feeding stock, &c., $96.16.

This claim was allowed, but the assignee refuses to pay it over upon the ground that his claim against Strickhouser is largely in excess of it, and that he is entitled to set it off.

The right of set-off in a case like this, was not contested on the argument, and doubtless because the petitioner's counsel had satisfied himself it would not avail him. He relied upon an agreement between these parties, which he has argued takes it out of the operation of a rule of law which might otherwise apply.

Strickhouser owed the assigned estate $202.08, for articles purchased by him, &c., and before the audit, when Strickhouser and Bare met to adjust their accounts, it was ascertained that Strickhouser's claim amounted to $298.24. They then agreed in writing that Strickhouser's claim should not be objected to by the assignee before the auditor, and that of this amount Bare should retain the sum of $202.08 in payment to himself in full as assignee and pay the balance of what was awarded, viz., $96.16. to Strickhouser. It is conceded that this amount was due Strickhouser for services rendered in taking care of the assigned estate, and was therefore a debt

due by the asignee and for which he was liable. He might or might not obtain a credit for it in his account, had he paid it over before the audit, or rather before the confirmation of the auditor's account. If not, he would have been required to make the estate whole and if unable to do so, his bond would be liable. It was not therefore a debt due by the estate, and hence there was such mutuality in these claims as authorizes a set-off by the assignee, who very justly treated it as his own proper debt.

This being true, we fail to find in the agreement any waiver of his set-off. As was aptly suggested on the argument of the case, suppose Bare had given Strickhouser his promissory note for $96.16, in discharge of this indebtedness, can it be pretended that he could not set off Strickhouser's indebtedness to him, and yet that would be quite as much a promise to pay, as is anything contained in the agreement. It being conceded that the debts are due and demandable in one and the same character, that they result from the mutual dealings of the parties, it seems decisive of the only question argued before us.

We must therefore decline to make the order we are requested to make, directing Bare to pay over the amount awarded to Strickhouser.

Rule discharged.

C. P. of Schuylkill Co.

Mattes v. Mock.

Negligence — Signing of note without reading—Relief against.

A man who signs a judgment note without reading it or having it read is guilty of supine negligence and is not entitled to relief.

Rule to set aside the judgment.

PERSHING, P. J. The only evidence to sustain this application is the deposition of the defendant. It is, in substance, as follows: On settlement made with A. & A. S. Mattes, defendant, gave them his note under seal, for the balance due them; this note was a blank filled out, and handed to the defendant, who signed it under the impression that it was a common promissory note, nor would he have signed it, had he known it was a judgment note; that Abm. Mattes deceived him by representing it as a common note. "This Mattes," says the defendant, "is a nephew of mine, and by reason of our relationship, I had confidence in him that he would do nothing wrong to me." Defendant farther states, that he is a poor English scholar, and transacts his business generally in the German language.

The signature of the defendant to the note, as also to his deposition, is in fair English handwriting, and his own testimony shows that the note was put into his hands, and that he had the opportunity to read it, or become acquainted with its contents, before he appended his name to it.

In Penna. R. R. Co. *v.* Shay, 2 Weekly Notes 45, Shay in the Court below had brought suit to recover damages from the company for the killing of his son. On the trial his release was presented, by the terms of which, in consideration of the payment to him of the sum of sixty-nine dollars and fifty cents, he discharged the company from all liability. To meet this, Shay testified: "He" (Williams, an employ of the company), "told me, here is receipt of funeral. I signed and he paid me. I can't read or write. This is my name. I signed it twice." It was held by the Supreme Court that there was nothing in this testimony to raise the question of fraud, and that it was error to submit it to the jury. The Court repeats what was said by Gibson, C. J., in Greenfield's estate, 2 Harris 496: "If a party who can read will not read a deed put before him for execution, or if being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law."

It has been more than once held that

it is error to submit a question of fraud to the jury upon slight parol evidence to overturn a written instrument. The evidence of fraud must be clear, precise and indubitable, othewise it should be withdrawn from the jury. Stine *v.* Sherk, 1 W. & S., 195; Irwin *v.* Shoemaker, 8 W. & S., 75; Dean *v.* Fuller, 4 Wright 474. —Since parties are allowed to testify on their own behalf, it has become still more necessary that this important rule should be strictly adhered to and enforced. Penna. R. R. Co. *v.* Shay, *supra.*

In the case before us the defendant's negligence is the only ground upon which the demand is based for setting aside the judgment. He cannot, on the slight grounds shown in his uncorroborated testimony, impeach the instrument he signed, sealed and delivered to the plaintiffs. It follows that this application must fail.

Rule discharged.

SUPREME COURT.

Daily's Appeal.

Divorce—Question of Desertion—When tried by a Jury.

A. and B., after their marriage, lived for ten months at A., the husband's mother's house; then the mother ordered B., the wife, out of the house. B. went to her stepfather's and lived there, A. never visiting her but once. HELD, that it should have been left to the jury whether A. wilfully deserted her.

Appeal from the Court of Common Pleas of Monroe County.

STERRETT, J. The substantial question involved in the issue demanded by the respondent in the court below, was whether he wilfully and maliciously deserted his wife. If the testimony tended to establish the affirmative of the issue, it was improperly withdrawn from the jury by instructing them, as matter of law, that their verdict should be for the respondent.

The libellant testified in substance that after their marriage she and her husband had lived together at the residence of his mother for about ten months, when the latter ordered her away and compelled her to leave the house; that she then appealed to her husband to join her in seeking another home, but he refused to do so, and, having no other place of shelter, she was compelled to return to her former home; that, ever afterwards, he not only refused to provide a home for her, or contribute in any manner to her support, but treated her with such studied indifference and disrespect that he never even called to see her, except on the next evening after she was obliged to take refuge under her stepfather's roof. On that occasion he came to the house and invited her to attend his funeral two days thereafter, but, having no faith in his implied suggestion, she declined the invitation. Thenceforth, according to her own testimony and that of other witnesses, by whom in the main she is corroborated, she appears to have been entirely abandoned by him.

The issue as to the charge of wilful and malicious desertion was granted upon respondent's demand, and, viewing the testimony as a whole, we think it should have been submitted to the jury. If they were satisfied that libellant was practically driven away from the house by respondent's mother, and he not only neglected and refused to provide another home for her, but never afterwards manifested the slightest desire to do so; in short, if his conduct towards her for a period of over two years was inconsistent with anything else than a determination on his part to ignore every marital obligation, the jury would have been warranted in coming to the conclusion that he had in fact wilfully abandoned and deserted her. If he thus acted wilfully and without cause, it necessarily follows that his conduct was also malicious.

Judgment reversed, and a *venire facias de novo* awarded.

Evidence—Sufficiency of proof.—The proof to surcharge an accountant, who is practically charged with embezzling $1500 of the bonds of decedent, should be such as would satisfy a jury that she had stolen the same.—*Milligan's Appeal,* 38 Legal Intelligencer 333.

YORK LEGAL RECORD.

VOL. II. THURSDAY, SEPT. 22, 1881. No. 29.

COMMON PLEAS.

County of York v. Alricks.

County taxes—Exemption of mortgages and other money securities from taxation.

The Act of 4 April, 1868, provides, "All mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate made and executed after the passage of this Act shall be exempt from all taxation, except for state purposes." HELD, that mortgages, judgments and recognizances, although not given for the sale of real estate, are exempt.

The words "for the sale of real estate," are confined to articles of agreement.

Case stated.

Case stated between plaintiff and defendant, in which the following facts, in the nature of a special verdict, were agreed upon by said parties, with the right to either party to take a writ of error to the Supreme Court without affidavit or bail.

Herman Alrick, Esq., is the surviving executor of the last will and testament of Gen. Jacob Spangler, late of the Borough of York, deceased, and as such, is the testamentary trustee of a certain fund given by said testator, in his will, for the benefit of his widow, Catharine Spangler, during her life time, amounting to the sum of sixteen thousand nine hundred and fifty-six dollars ($16,956), of which amount, the sum of sixteen thousand one hundred and sixty-eight dollars ($16,168) is now, and was at the time of making the annual assessments of said county for State and County purposes, assessed for county purposes at the rate of seven mills on the dollar, amounting to the sum of one hundred and thirteen dollars and seventeen and six-tenths cents ($113.17.06) which amount of tax is now demanded by the proper tax collector from said defendant, said amount assessed, being loaned on judgment and mortgage. If the Court should be of opinion that said sum so assessed for county purposes, is subject to the payment of said county tax, then judgment to be entered in favor of plaintiff for one hundred and thirteen dollars and seventeen cents with costs of suit. If they should be of opinion that it is not taxable for county purposes then judgment to be entered in favor of the defendants with costs.

E. H. WEISER, for Plaintiff.

HERMAN ALRICKS, trustee of Gen. J. Spangler, deceased.

The Act of Assembly referred to is as follows:

AN ACT to promote the improvement of real estate by exempting mortgages and other money securities from taxation, except for State purposes, in certain counties of this commonwealth.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That all mortgages, judgments, recognizances and moneys owing upon an article of agreement for the sale of real estate made and executed after the passage of this act, shall be exempt from all taxation except for State purposes; and that from and after the first day of December next no taxes of any description shall be assessed or collected except for State purposes, on or from mortgages, judgments, recognizances or moneys owing upon articles of agreement for the sale of real estate, whether made and executed before or after the passage of this act: *Provided,* That nothing in this act shall be construed to apply to mortgages, judgments or articles of agreement given by corporations: *Providing,* That this act shall only apply to the counties of Berks, Schuylkill, Luzerne, Clearfield, Allegheny, York, Delaware, Montgomery, Chester, Lancaster, Huntingdon, Fulton, Bedford, Blair, Lebanon, Clinton, Carbon, Monroe, Lehigh, Mifflin, Westmoreland, Northampton, Juniata, Somerset, Indiana, Greene, Elk, Forest, Franklin, Perry, Cumberland, Dauphin, Lawrence, Lycoming, Union, Snyder,

Erie, Crawford, Bucks, M'Kean, Fayette, Philadelphia and Mercer.

E. S. Weiser for plaintiff.

Herman Alricks for defendant.

FISHER, P. J. The question raised is whether under the act of 4 April, 1868, the fund mentioned in the case is taxable for county purposes.

The debates referred to on the subject by the counsel for the defendant taken from the legislative record of 1868, page 822-908-910, show that one of the advocates of the bill, Mr. Jones, of Berks, intended that it should have the effect of exempting judgments and mortgages and other securities mentioned in the law from taxation — because the money would be otherwise loaned with a stipulation that the borrower should pay the taxes in addition to the legal interest, or if that was not done then the money would be invested in United States bonds or other securities which would not be subject to taxation for county rates and levies.

The intention of the Legislature in passing an act gathered from the legislative debates can have no weight with us. We cannot consider them in giving a construction of the law. We are confined to its title, the preamble, and the words used in the statute itself; from them we must extract the object of the law and the true interpretation of it. In discovering the intention of the legislature where there is a doubt about the meaning recourse may be had to the title which, although not considered as a part of the act may slightly aid in removing ambiguities; King *v.* Marks, 3 East. 160; Rex. *v.* Inhabitants of Gwinass, 5 T. R. 135.

In like manner use can be made of the preamble when there is one, but in this act there is none.

Using then the title as well as the body of the enactment to elucidate its meaning does the statute exempt the securities in question from taxation for county purposes?

The words mortgages, judgments, recognizances, and moneys arising upon articles of agreement for the sale of real estate appear to be distinct enumerations, descriptive of several things, not to be taxed; and designating securities given for the payment of money due for the purchase of real estate as one of those not taxable. It may be observed that while in the first clause of the section "and" precedes the words "articles of agreement for the sale of real estate," in the clause declaring what shall not be taxable after the first of December, 1868, "or" is used, the words being, "or moneys, owing upon articles of agreement for the sale of real estate," thus clearly separating them by the use of the disjunctive conjunction.

Although the section may not be as explicit as it might have been we have come to the conclusion that its intention was to exclude mortgages and judgments from objects, made taxable for county purposes, and that therefore judgment must be rendered upon the case stated for the defendant with costs.

Judgment on the case stated for the defendant with costs.*

C. P. of Delaware County.

Noll v. Kline.

Landlord and Tenant—What constitutes a Leace—Wages, priority of, under Act of 1872.

Any agreement, whether by writing or parol, under which one party divests himself of the possession and the other comes into it for a determinate time in consideration of a certain profit issuing yearly out of the lands and tenements demised, constitutes a lease, and establishes the relation of landlord and tenant.

An agreement to pay "a rent of seventy-five cents per thousand for all bricks made and burnt during the term," to be paid "when and as soon as each kiln is counted," is sufficiently certain for a lease.

Upon an execution issued by a creditor against a tenant holding under such a lease, the landlord is entitled to his rent for all bricks actually burned and on the premises at the time of the levy, though not yet all counted.

Sur exceptions to report of Auditor distributing funds from Sheriff's sale.

CLAYTON, P. J. The defendant, Samuel Kline, had the exclusive possession

*This same question was afterwards decided in a similar manner by the Supreme Court in Westmoreland County *v.* Fries, 30 P. F. Smith 51.

of a piece of ground and brick yard in Ridley township. His right of possession was based upon an agreement in writing dated May 16, 1878, between him and Mendenhall & Johnson. The agreement sets forth that the parties of the first part (Mendenhall & Johnson) do *let* unto the said Kline the premises therein described; that the term of the *lease* is to be one year from the 1st day of March, 1878; that the said Kline shall pay "a *rent* of seventy-five cents per thousand for all bricks made and burnt during the *term*, and pay the said *rent* when and as soon as each *kiln is counted*, except that the bricks in the kilns on the first day of January, A. D. 1879, shall be estimated and paid for at that time." The parties of the first part reserved the right to store the bricks on the premises at the date of the above mentioned agreement, "the party of the second part to have the same right after the expiration of the *term of this lease* to bricks which may belong to him on said premises when this *lease* expires." Under this agreement Kline took possession and commenced the manufacturing of bricks. Becoming embarrassed the Sheriff, under an execution upon a judgment confessed to Noll, levied upon and sold all the defendant Kline's personal property upon the premises, including all the bricks then on hand. Upon the distribution of the fund raised by the Sheriff's sale the several questions now under consideration arose.

The first question was: Whether the agreement above recited was such a *lease* as entitled the said Mendenhall & Johnson to the common law right of distress for rent in arrear, and the statutory privilege to claim payment of one year's rent out of the fund in preference to the execution creditor?

Second: Whether, granting the landlord's right of distress, the whole rent was due?

Third: Whether the claim for wages had priority over the rent?

The Auditor appointed to report distribution has decided all these questions in the affirmative. To his report both parties have excepted.

The landlord complains because the auditor has given preference to the wages.—The plaintiff in the execution is dissatisfied because the rent has been preferred to his execution. The first question is, whether the relation of landlord and tenant existed between Mendenhall & Johnson and Kline.

It is not every agreement for the possession of lands and tenements which gives to the owner of the fee the rights of a landlord or subjects the possessor to the liabilities of a tenant. In order to constitute a valid lease, to which the right of distress will be incident, the landlord must divest himself of the possession and the tenant must come into it for a determinate time. This divestiture of the landlord and possession of the tenant must be in consideration of a certain profit issuing yearly out of the lands and tenements demised. Whatever agreement for the possession of lands comes up to these requirements, whether it be by writing or parol, whether it run in the form of a license or a solemn covenant, will amount to a lease for years as effectually as if the most proper and pertinent words had been used for the purpose. (See Brown *v.* Jaquette, C. P. Del. Co. Paper, June 12, 1878.)

There are certain technical words, such as *lease and to farm let, rent, term*, &c., which when used in an agreement for the possession of lands, indicate the relation of landlord and tenant. It will be observed that most of these words are used in the agrement in this case. As to the rent reserved it can easily be rendered certain, and it is a legal maxim that whatever can be rendered certain, is certain. The rent is not payable in bricks as the defendant seems to suppose, in money. The time for payment is fixed when the bricks are burned and counted; that is to say, whenever they *may* with certainty be counted they will in contemplation of law, and according to the true

construction of the agreement, be considered as counted.—The amount to be paid depends upon the number of bricks burned. The term is for one year, and the possession of the tenant was absolute and full. If authority is necessary for pronouncing this agreement a lease it will only be necessary to cite the case of Moore *v.* Miller, 8 Barr 273, where it is held that a parol agreement to enter on land, dig for ore, erect buildings, &c., and pay fifty cents a ton for all ore removed amounts to a lease.

The second question is, Whether, granting the lease, was the whole amount of rent awarded due? All the bricks had not been *actually* counted. This the exceptant contends was a *sine qua non* to the collection of the rent. As before stated, if the bricks were actually burnt and in condition to be counted with certainty, the proper construction of the agreement is to consider them as counted, so far as the landlord's right to rent is concerned. Any other construction would place him without remedy. The auditor was, therefore, right in allowing rent for all bricks actually burned and on the premises at the time of levy, especially as they were sold by the sheriff by number and not in bulk.

The only remaining question is, Whether the claim for wages had priority to the claim for rent?

This claim depends upon the act of April 9, 1872, and its supplement and explanatory act of June 12, 1878. Neither of these acts can have a construction which would violate the obligation of any existing contract. Any lease, therefore, enacted before the passage of the act of 1872 would not be effected by it, and the rent due under such a lease would be prior to wages, notwithstanding the words of the act to the contrary; but the lease in this case was made in 1878, at a time when the act of 1872, giving wages a preference over rent, was in full force; that act must be taken as a part of the contract and settles the question against the landlord's right to priority to the claim for wages. It is admitted that the act of June 12, 1878, has no effect upon the lease in this case, but it was clearly subjected to the act of 1872.—Wood's Appeal, 6 Casey 274-279.

Exceptions dismissed and report of the auditor confirmed.

WHAT IS THE WOOLSACK?—The personage who takes precedence of all the Peers and presides over the House of Lords is the Lord Chancellor, and the seat he occupies is called the "Woolsack." This is literally a bag or sack of wool, and is covered with red cloth, but has no support in the shape of back or arms. You may think it curious that the Lord Chancellor of England should sit upon a woolsack, but the custom has a venerable origin, for it is referred back to the time of "Good Queen Bess." In Elizabeth's reign an act of Parliament was passed forbidding the exportation of wool, then an important source of the nation's wealth; and that this fact should ever be kept constantly in mind, it was ordained that a woolsack should be placed in the House of Lords. Though wool is no longer the sole source of our national riches, and consequently there is not the same need for reminding the Peers of this fact, the woolsack is still used as the seat for the Lord Chancellor.

Criminal Court—Authority of jury to name prosecutor.—An endorsement by a District Attorney of a prosecutor's name, upon the back of an indictment, is not conclusive upon the jury. They may find some other person as the culpable presecutor and may put the costs upon him. They cannot, however, select a witness without notice and without his consent, and put the costs upon him, for that would be to condemn him without a trial or confession. *Com'lth v. Jackson*, (Delaware Q. S.) 1 Delaware Co. R. 81.

YORK LEGAL RECORD.

Vol. II. THURSDAY, SEPT. 29, 1881. No. 30.

COMMON PLEAS.

Fitzsimmons v. Fitzsimmons.

Sheriff's sale—Notice to Defendant.

When the Sheriff neglects to notify the defendant of the sale of his property, as required by the Act of 16 June, 1836, the sale will be set aside, notwithstanding the fact, that a handbill was posted at the hotel where he last resided, and that he was seen about the Court House immediately preceding the sale.

Rule to set aside Sheriff's sale.

September 19, 1881. WICKES, A. L. J. The precise question presented for decision in this case was before us on the application of Jacob R. Spangler to set aside the sheriff's sale of his real estate made under *vend. ex.* No. 93 of July Term, 1876.

In that case as in this, the sheriff failed to give the defendant notice of the day and hour and place where the sale would take place, and in both instances, no proper effort shown to comply with the plain requirements of the act of 16th June, 1836. 1 Purdon 650, pl. 76. It is not denied that the statute requires the sheriff to notify the defendant, but it is urged that the defendant had notice, because he must have seen the handbills posted at the hotel where he last resided, and also because he was seen about the Court House immediately preceding the sale. But he was not present at the sale, as in the case cited from 2 Clark 238, nor was a copy of the printed handbill left at his place of residence for him. In addition to this the defendant swears that he knew nothing about the sale. It is asserted that he is contradicted and ought not to be believed.—It is true that the accuracy of his testimony in regard to other matters connected with this application is seriously questioned, but does that relieve the sheriff from the performance of a plain duty which the act under which he proceeded, clearly imposes upon him?

The law does not leave a defendant to the mere accident of seeing from the printed notices required to be posted, that his property is to be sold; it throws around him the safeguard of a special notice, which must in every instance be given, or the failure accounted for in some more satisfactory way than is here shown.

And now to wit, September 19th, 1881, the rule is made absolute.

C. P. of Lancaster Co.

Herr's use v. Adams.

Sheriff's sales—What sufficient description of premises—Sale will not be set aside for inadequacy of price alone.

In a description of property to be sold at Sheriff's sale, its actual state is to be looked at, and no further. The description of the usual necessary offices of the dwelling and back buildings that are not independent improvements on the rear of the lot has never been required as essential.

Exceptions to sheriff's sale, and motion to set same aside.

PATTERSON, J. There are eight exceptions filed to the said sale: First. Misdescription—that the property of defendants, instead of consisting of one purpart, as advertised by the sheriff, consists of three, purchased of three different grantors, and held by three several titles, &c.; second, the sheriff did not advertise that the house had a sub-story or basement; third, the sheriff did not advertise that the house was fitted up with gas and gas-fixtures, and that the pipes were connected with gas-mains; fourth the sheriff did not advertise a valuable and extensive grapery on the premises, etc.; fifth, the sheriff did not advertise the fact that a three-fourth acre composing the three purparts was a valuable truck garden; sixth, the sheriff did not advertise the fact that viewers had been appointed by the Court to open Poplar street, which forms the southern boundary of the premises, and whereby an additional frontage of one hundred and twenty feet would be added, &c.; seventh, the sheriff sold the property for an inadequate price; eighth, the purparts are fully worth $3000.

On the argument, and while the same was proceeding before the Court, we were of the opinion that the sheriff's sale could not stand and felt inclined to set it aside, but on reading the whole testimony taken under the rule granted to show cause, and after reference to the decisions in analogous cases, we were forced to the conclusion that the rule has not been maintained and that it must be discharged.

It is objected that the sheriff's advertisement is not sufficiently specific in describing the property sold. On an inspection of the sheriff's bill it seems to be as full and explicit, and to conform to the property sold, as usual.

The objection that the basement was not mentioned; that the house was fitted with gas-fixtures; that it was described as a "lot or piece of ground situated on the south side of St. Joseph street" (which is the language of the bill), instead of three purparts, because it was purchased of three grantors and held by three several titles, &c., such particularity has never been required.

The actual state of the premises is to be looked at, and no further; as to the fact that titles of two lots were different and the ground rents unequal, it has been held that that can make no difference, and the description of the usual necessary offices of the dwelling and back buildings that are not independent improvements on the rear of the lot, has never been required as essential; Burkholder *v.* Sigler, 7 S. & R. 154; Troubat & Haly, vol. 1, part 2d, 999 & note.

The sheriff's bill mentions the exact frontage in feet, on St. Joseph street, and the depth of the street running back to Poplar, which the depositions show is the fact, and it also mentions "grape vines" and outbuildings—specifying them; and the proof is that all were under one fence or enclosule, and to require the sheriff to specify that part of the same was a valuable truck garden would be requiring the expression of a prediction only as to appropriation in the future.

As to the exception, that the property sold for an inadequate price, the rule is that mere *inadequacy* is not of itself a sufficient reason for setting aside a sheriff's sale; Troubat & Haly, vol. 1, part 2d, p. 1011. Where the inadequacy is very gross, the Court will take advantage of even a slight irregularity in the proceedings to set the sale aside. But from the testimony submitted, though conflicting, a gross inadequacy of price is not made to appear; and amongst all of the witnesses none of them expressed a willingness to bid more for these premises if put up a second time.

Nor can the Court see such irregularities in the proceedings as would justify the setting aside this sheriff's sale; 6 Watts 140; 1 Miles 404; 2 Pa. R. 380.

Rule discharged.

C. P. of Delaware Co.

Assigned Estate of John J. Roland.

Building Association Mortgage—Usury.

It is usury for an unincorporated Building Association to deduct premiums from the principal of a mortgage executed to a trustee for them.

In an action brought by the Building Association, after incorporation, upon such a mortgage, the defense of usury may be set up by the mortgagor or his assignee for benefit of creditors.

Sur exceptions to Auditor's report.

CLAYTON, P. J. The mortgage, under which the Second Media Building Association claims, was executed by the said John J. Rowland to H. Jones Brooke, trustee for an unincorporated society.—True the society had the same name as the association now claiming the fund, but this does not make it the same person.—Rowland had no power to compel the incorporation of the company of individuals for whom Mr. Brooke acted as trustee. If they had continued in the same condition they were in when the money was borrowed, there can be no question but that the transaction would be usurious and void

as to the premium paid for the loan. How then can the fact of the subsequent incorporation of the company make any difference? They claim under the mortgage not as mortgagees, but as assignees of the mortgagee. It is admitted that only $1062 was loaned, or actually paid for the mortgage of $1200. The sum of $138 was, therefore, usurious and if objected to by either Rowland, the mortgagor, or his assignees, cannot be recovered. The argument so earnestly enforced by the counsel for the association, that because no certificate of stock was issued until after the incorporation, it was virtually a loan to the incorporated society, is not sound. The certificate could have been issued before, as well as afterwards. He assigned his stock to the association before the act of incorporation. It is a mistake to suppose that no company can issue stock without incorporation. Joint stock companies are as old as commercial law, and were originally unincorporated, the stock representing the interest of the holder in the assets of the firm. The entire assets in such cases are valued and divided into shares, equal at par in the aggregate to the assets. As the assets increase the stock rises above, and as the assets are lost, the stock falls below par, thus affording a true scale by which to ascertain the exact interest of the stockholders in the assets of the firm. This company was therefore, before incorporation, nothing more than a co-partnership or joint stock company. If Mr. Rowland, the borrower, had not made an assignment of all his rights for the benefit of his creditors, it is undoubtedly true that the right to object to the usury would have been personal to him. But his assignment carried all his rights, including the right to object to this usurious payment, to his trustees; and as I understand the facts, they, or one of them, did object to the payment of the premium charged on said mortgage, as usurious.

The mortgage, being subject to a judgment which was a previous lien, was discharged by the assignees' sale of the mortgagee's land. The association appeared before the auditors and claimed the face of their mortgage with interest thereon. One of the assignees, Mr. Darlington, objected to the premiums as usurious. Both assignees now except to the ruling of auditor, awarding the whole amount of the mortgage to the association. The auditor, upon the ground that the right to set off a usurious payment is personal to the one paying it, ruled that as Rowland did not in person appear and claim the set off, it could not be done by his assignees. This was error. The corporation stands in no better position than the original mortgagee did at the time of the assignment; whatever would have been a defense against the mortgage in the hands of Mr. Brooke, will be equally good against his assignees. They knew when they took the assignment of the mortgage that it was tainted with usury. If they were ignorant of that fact, their present position would be no better, as they have not produced a certificate of *no set off* from Rowland, as a part consideration for the assignment to them. The assignee, for the benefit of creditors takes all the rights of the assignor in a double sense: first, for creditors; second, after the payment of all debts, for the assignor. A simple illustration will simplify the case. The law permits the borrower on a usurious contract, to either set off the usury to a suit upon the instrument, or he may pay it or suffer it, by inaction on his part, to be collected by process of law.—But in the latter case he may, at any time within six months, sue for and recover back all the usury. By applying the law as thus stated to this case, what would be the result of the auditor's view? Would it not be to permit the association to recover its whole mortgage debt and also to permit Mr. Rowland at any time within six months, to sue and recover it back again? If he were to institute such a suit, the *right* having existed before his assignment the suit would necessarily have to be for the use of his assignees. If, therefore, the suit must be for their

use, it follows that the *right* now belongs to them, or to either of them choosing to exercise it; and as one of them has clearly exercised it, the auditor should have allowed the set off of $138 on the face of the mortgage.—After the assignment of the mortgage to the corporation, all interest and fines paid by Rowland properly accrued to it, and they cannot be set off to the mortgage.—This case is recommitted to the auditor to correct his table of distribution in conformity with this opinion.

Exceptions sustained.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Beneficial Society — Sick benefits — Non-payment of dues.—Where there is competent evidence from which a jury may find a fact, their errors of judgment are beyond correction. A member of a beneficial society, who is beneficial when he falls sick, can not be suspended during that sickness for non-payment of dues. In an action by a Beneficial Society against a member of the society, he may set off such benefits as he was entitled to receive from the society. In an action against a surety, he, with the consent of the principal, can avail himself of all the rights and all claims of set-off of the principal debtor.—*St. Michael's Beneficial Society v. Brannan,* (Delaware C. P.) 1 Delaware Co. Reports 105.

Criminal law—Indictment for election frauds—Limitation.—An indictment for conspiracy charging the commission of frauds at an election is a common law offense, and the limitation of one year in the act of 1839, therefore, does not apply.—*Com. v. McHale et al.,* 12 Pittsburgh Legal Journal 48.

District Attorney—New Constitution —Act of 1866.—The Court under the act of March 12, 1866, may appoint a special District Attorney to try cases, and his signature to an indictment is proper and legal. Such appointment is not in conflict with the provisions of the New Constitution.—*Com. v. McHale et al.,* 12 Pittsburgh Legal Journal 48

Debtor and Creditor—Equity of creditor in debtor's securities—Bona fide assignees.—The equity which a creditor has in the securities held by his debtor's securities, does not follow them into the hands of a *bona fide* assignee without notice.—*Mifflin Co. National Bank's Appeal,* 38 Legal Intelligencer 349.

Judgment—Marking judgment satisfied—Party in interest.—A subsequent judgment creditor is not a "person concerned in interest" in a prior judgment within the meaning of the Act of March 14, 1876; and he has no standing to apply, under that act for an order on the Prothonotary to mark such prior judgment satisfied of record upon the ground that it is paid.—*Hildebaugh v. Thomas,* 38 Legal Intelligencer 349.

Mortgage—When due.—A mortgage which does not specify when it is payable is due upon demand, and a *sci. fa.* can be issued a year and a day afterwards.—*The Mutual Saving Fund v. Henneberg,* (Schuylkill C. P.) 2 Schuylkill L. Rec. 150.

Trusts—Wrongful use of trust money by trustee — Resulting trusts. — Where trust moneys were used by a trustee, not in the acquisition of the title to real estate, but in its improvement, the proceeds of the sale of such real estate by the assignee for the benefit of creditors of the trustee is not impressed with a resulting trust for the trust moneys so used.

Nor do the beneficiaries have a lien on the land, arising from the equitable circumstances of the case. Such a lien is unknown to Pennsylvania jurisprudence.

A resulting trust in lands must arise, if at all, at the inception of the title.—*Cross' Appeal,* 12 Pittsburgh Legal Journal 50.

YORK LEGAL RECORD.

VOL. II. THURSDAY, OCT. 6, 1881. No. 31.

COMMON PLEAS.

Shoff v. Skiles and Frey.

Affidavit of defence—Instrument within meaning of.

The affidavit of defence disclosed the fact that one-half of the tobacco sold by plaintiff to defendant belonged to a third party, and that when the defendants paid the plaintiff for his half it was agreed that the remaining money due belonged to and should be paid to said third party by the defendants. It also appeared that there were other matters in controversy between the third party and the defendants, HELD, that an affidavit of defence setting forth these facts was sufficient.

A contract, certifying that "I have bought of Mr. Shoff, 1880 crop of tobacco, amounting to 2½ acres," (then setting forth the prices to be paid), "the same to be well assorted and delivered in good merchantable order at our warehouse," is not a contract within the meaning of the Act relating to affidavits of defence.

Rule for judgment for want of a sufficient affidavit of defence.

The defendants, through an agent, entered into the following contract with the plaintiff:

"This is to certify that I have bought of Mr. Simon Shoff 1880 crop of tobacco, amounting to 2½acres (——) pounds.

Best wrappers at 8 cents per pound.
Short " " " " "
Seconds " " " " "
Fillers " at 2 cents per pound.

The same to be well assorted and delivered in good merchantable order at our warehouse. D. B. SAYLOR.

(Endorsed.)

Bring tobacco to Wrightsville on Saturday, June 11."

On the strength of this promise, the tobacco was delivered. One-half of the money was paid and suit was brought for the remainder.

The defence appears in the Court's opinion.

September 19, 1881. WICKES, A. L. J. The affidavit of defence filed in this case discloses the fact that one-half the tobacco sold and delivered by plaintiff to the defendant belonged to Jacob Kohler. the owner of the land on which it was raised, and that when the defendants paid the plaintiff for his half, that it was "then and there agreed that the remaining money due belonged to and should be paid to said Jacob Kohler by the defendants." If the only difficulty in the way of payment to plaintiff of the balance due for the tobacco, was that Kohler might hereafter call upon the defendants for his share of the money, it would be removed by the filing of a release from Kohler to the defendants of all his interest in the matter.

This the plaintiff's counsel, who is also Kohler's counsel, offered to do—but it is manifest from what was said at the argument, that this is not the only difficulty to be guarded against. Kohler and these defendants have an unsettled controversy growing out of the purchase and sale of other tobacco, which it is said Kohler agreed to deliver, but never did. The effect, therefore, of entering a judgment here would be to deprive the defendants of an advantage they have and are fairly entitled to, of holding on to the balance in their hands, until their counter claim against Kohler is adjusted. Kohler has it in his power to bring this question to an issue at any time, and it is no hardship to compel him to do so.

This state of facts does not appear on the face of the papers, nor does the offer to file a release, but it was all discussed at the argument of the motion and unquestionably constitutes the correct relation of the parties.

But apart from all this, there is another objection to entering judgment as prayed for.

It is admitted that the contract upon which the suit is brought is not within the terms of the Act approved April 9th, 1868, P. L. 780, under which judgment is authorized for want of a sufficient affidavit of defence.

Counsel have filed an agreement that it shall be heard as within the meaning of that Act. But this is not a practice we feel disposed to encourage. The act prescribes the instruments of writing to which it applies, and we feel no inclination to give it a broader scope because

counsel agree that we may do so. *Ita lex scripta est*, and that is the end of the matter.

And now to wit September 19th, 1881 Rule discharged.

C. P. of Luzerne Co.

Bennett's Estate.

Wages—Notice to Sheriff—Nature of.

A notice in writing, at any time before the actual sale of the property, stating the amount claimed, for what, and out of what estate, is sufficient notice of claim for wages under the Act of April 9, 1872.

HANDLEY, J.—The notice need not state the business in which the employer was engaged, the kind of services rendered by the claimant, and the particulars of the service, and that a lien is claimed upon the property seized by the officer;* if these facts are found by the auditor on distribution it is sufficient.

Exceptions to report of auditor.

HANDLEY, *J.* The personal property of W. H. Bennett was sold by the sheriff on September 25, 1876, for the sum of $206.25. This sale was made by virtue of several executions then out and in the hands of the sheriff. Attached to one of the executions was a notice dated September 25, 1876, directed to the sheriff, and signed by Stine, who states therein, that he has a claim for labor done for W. H. Bennett, and desires the sheriff to withhold from the proceeds of the sale of the property of Bennett, twenty-eight dollars. C. W. Randall also gave notice on the same day that he claimed two hundred dollars for labor done for W. H. Bennett. Geo. W. Oakley also gave notice, but failed to appear before the auditor and make good his claim, whereupon the Oakley claim was disallowed. The auditor found, from the evidence, that Bennett was indebted to Randall in at least the sum of two hundred dollars. While the auditor fails to say in his report that the respective claims of these parties were for work and labor done for Bennett, yet that, no doubt, was intended. The evidence of Mr. Bennett, certified with and attached to the report, shows that the claim of these parties is for labor. Bennett says that "up to the day of the sale he was owing Randall three hundred and twenty-eight dollars and fifty-eight cents. To six months previous to the sale Randall worked for him nearly every day. . . . He did wheelwrighting or wagon work. . . The property sold on the writ was used in and about the manufactory of wagons." Bennett then adds, "I am acquainted with Isaac Stine. He has been employed at my shop. . . . I think the notice given by Stine is correct. It was all earned within six months previous to the sale." The testimony of Randall and Stine establishes the same fact. The auditor disallowed the claim of Randall and Stine, and awarded the balance of the fund, eighty-nine dollars and twenty-seven cents, to the landlord for rent. To this report Randall and Stine filed exceptions: (1) Because the auditor did not appropriate the fund to the claim of the said Randall and Stine. (2) Because the auditor refused to take into consideration the amount paid by the plaintiff in the writ to the said landlord during the sheriff's sale. The first and second exceptions we will consider together. The auditor based his finding in this case upon the ruling of the Supreme Court in the case of the Bank *v.* McMillen, 1 Weekly Notes 55, but the facts in that case and in this are entirely dissimilar.—In that case, as we find it reported, it seems that the only notice the sheriff received was a list containing names, with certain amounts set opposite them. The sheriff paid in full the execution on which the sale took place, and paid the balance of the proceeds into court. The auditor, appointed to distribute the amount thus paid in, allowed the claims for labor; but the court below, being of the opinion that the notice given to the sheriff was not suffcient, set aside the report, and awarded the whole amount to the bank. This ruling, upon appeal, was sustained. The court said that "the written notice served upon the sheriff in this case was but a memorandum of the names of certain persons and the sum opposite; it did not refer to the property, or claim any lien thereon." In the case in hand, the notice is not as full

*See *contra*, Hoffacker v. Hoffacker, *ante* 104. in which it was held that the notice must set forth that a lien is claimed upon the property to be sold.

as it ought to be, but the notice states very clearly that the claim is "for labor done for W. H. Bennett," and the Stine notice demands "the sheriff to withhold the amount of money claimed." The notice required by the Act of 1872 (2 P. D. 1464, sec. 2), is that "in all cases . . . it shall be lawful for such . . . laborers . . . to give notice in writing of their claim or claims, and the amount thereof, to the officer . . . at any time before the actual sale of the property levied on." The Act of 1872 is more of a fertilizing act, passed to promote the growth of statement, than a remedial act, to protect the rights of the working masses. But whether it is a fertilizing act or a remedial act, it is our duty to give it the most reasonable and liberal interpretation, so as to carry out the object named therein. What other notice, therefore, need be given by a laborer than a notice in writing, at any time before the actual sale of the property, stating therein the amount he claims, for what, and out of what estate. This is all that the law requires of him, and this may be done in the most simple manner possible. As an exposition of the weight to be attached to the notice, and the form thereof, we may look at the Act of 1874 (Purd. Dig. 1966, sec. 2), which repeals the lien notice against real estate, and yet the act of 1872 expressly provided that "no such claim shall be a lien on real estate, unless the same be filed . . . . . within three months after the same becomes due." Now, a laborer may have a lien on real estate, and yet no notice is required. He has, as we said in the case of Teets *v.* Teets, 6 Luz. Leg. Reg. 20, a secret claim against any purchaser, or any creditor who has not by mortgage, judgment, or execution acquired a prior lien. In the case of William Pieffer, 6 Luz. Leg. Reg. 101, it was held that the notice must state the business in which the employer was engaged, the kind of service rendered by the claimant, whether as clerk, miner, mechanic, or laborer, and the fact that a lien is claimed upon the property seized by the officer; also, the particulars of the service, and the amount claimed. This, we are of the opinion, is altogether too specific. What does the poor laborer know about giving notice as here detailed? We take it that it is the duty of the auditor to ascertain these details from the evidence before he makes his report. The statute says simply that he shall, before actual sale, give notice of his claim. If he gives notice, before the actual sale of all the property levied upon and the money paid over, that he has a claim for wages against the defendant in the writ, that fulfills the full measure of the statute, and the laborer ought to be allowed his claim, if the evidence taken before the auditor establishes that his claim is within the statute, due and unpaid, and is an honest debt. But the Pieffer case has no bearing upon the important question in this case. In that case the debtor was engaged in mining and building houses at the mines, and he was also engaged in keeping a hotel, separate and distinct from his mining business. The fund for distribution was raised by the sale of the personal property in and about the hotel, The court adds, "The auditor, therefore, rightly decided that the execution creditor was entitled to the proceeds of the sale, and the persons employed at the mines had no lien upon the property, or claim upon the fund." The evidence in this case develops no such state of facts, and hence there cannot, under the evidence taken before the auditor, be any doubts about what property was sold and lienable for the wages of these men.

We are of the opinion that the auditor erred in allowing the claim for rent and disallowing the claims of Randall and Stine for wages out of this fund. The first and second exceptions are sustained, the third not considered; and, thereupon, we remit the report to the same auditor to distribute the fund pro rata between Randall and Stine in proportion to their respective claims.

C. P. of Lancaster Co.

Knapp v. Stoner.

No appeal from the judgment of justices and alderman shall be allowed unless the party appealing shall *pay all costs* accrued before said justice or alderman, except where the parties reside in the county and the appellant makes oath that he or she is unable to pay said costs.

An alderman or justice has a right to issue execution, where the same is demanded, at any time after the rendition and entry of judgment.

The costs of execution, where execution has been issued, are part of the costs which must be paid before an appeal is allowed.

Appeal by defendant from judgment of alderman.

Rule to show cause why appeal should not be stricken off.

August 13th, 1881. LIVINGSTON, P. J. Suit was brought by plaintiff against defendant before A. F. Donnelly, an alderman in and for the city of Lancaster, on February 16, 1881. Plaintiff's claim was for work and labor, the demand for $61.56. A hearing was had on February 21, 1881, and judgment reserved. On February 24, 1881, judgment was entered in favor of plaintiff for $50.71 and costs of suit. On February 28, 1881, execution was issued by the alderman, and on March 1, 1881, the defendant appealed from the judgment of the alderman, and entered bail properly for future costs, at the same time paying all the costs which had accrued up to the time of the rendition of judgment ($2.72), and refusing to pay the costs of the issuing of the execution, 87 cents. And the question now raised is, was he in law bound at the time of taking his appeal, to pay the costs of the execution which was issued before the expiration of the twenty days allowed by law for taking an appeal, and must the appeal be now stricken off by reason of his failure to pay those costs?

After a full examination of the various Acts of the General Assembly of this Commonwealth, relative to the duties and powers of justices of the peace and aldermen in civil cases, we have been unable to find any law prohibiting the issuing of an execution at any time the same may be demanded after the rendition and entry of judgment in cases like the one now before the Court. The issuing of the execution however does not prevent the taking of an appeal within the twenty days allowed by law in ordinary cases —the law, in reference to appeals, being in this respect much like that which relates to stay of execution, and the construction which has been given to the 6th section of the Act of 1810, permits any defendant to obtain a stay of execution within twenty days after the judgment, *although in the interval an execution has actually issued*, and this, whether the judgment has been obtained by default or on hearing, and whether the suit was instituted by capias or summons; Stiles *v.* Powers, 1 Ash. 407.

The Supreme Court of Pennsylvania has held that "if an execution be *immediately* issued upon a judgment of a justice, and the money be made by a sale of defendant's personal property, it is then *too late* to enter bail for stay of execution, or to enter an appeal by the defendant, *although the twenty days* allowed by the sixth section of the Act of 1810, have not expired, and the purchaser of the property has a legal right thereto: Patterson *v.* Peironnet, 7 Watts 337.

The right of the justice to issue execution immediately on demand, after the entry of judgment in case like the present, having been established, the Acts of Assembly relating to payment of costs on appeal from the judgment of justices and aldermen, require that no appeal shall be allowed unless the party appealing shall *pay all costs* accrued before the alderman or justice, unless the appellant shall make oath that he, or she is unable to pay said costs, where the parties reside in this county.

The alderman having as we have seen, a right to issue the execution in this case at the time it was issued, and the costs thereof being part of the costs accrued before him, those costs not having been paid at the time of taking the appeal, as is admitted, and as it appears by the transcript, requires us, under the law, to make the rule absolute and strike off the appeal.

Rule made absolute and appeal stricken off.

YORK LEGAL RECORD.

VOL. II. THURSDAY, OCTOBER 6, 1881. No. 31.

COMMON PLEAS.

C. P. of Chester Co.

Detwiler v. Grubb.

Defendant's estate—attachment on executor.

L's executor sold certain real estate, and under the provisions of the will, secured $1,700 of the purchase money by mortgage on the land, for the use of testator's widow during life. The will directed that after the widow's death this sum, among others, should be paid to the executor, and by him distributed among testator's children. Three attachment executions were issued to attach the share of one of the children; the two first were served upon the owners of the land as garnishees,—L's executor being dead and letters with the will annexed not then being granted; the third, upon L's administrator *d. b. n. c. t. a.*

HELD, that the attachments will bind the fund in the order of their service.

HELD, *also*, that the fund must be distributed in the hands of the administratrix with the will annexed, subject to the rights of the attaching creditors.

FUTHEY, P. J.—The object of the attachment, and service is to warn the garnishee not to pay the money to the legatee; not to warn him to hold it as against the administrator charged with the settlement of the estate.

Case stated in which Elizabeth Detwiler, administratrix d. b. n. c. t. a. of Isaac Longenecker, deceased, is plaintiff, and Harrison Grubb and John Grubb are defendants. The facts appear sufficiently in the opinion of the Court.

Monaghan & Bro. for plaintiff, claimed that the money should be distributed in the hands of the plaintiff, Longenecker's administratrix.

Wm. B. Waddell, for defendants.

Wm. M. Hayes, for first attachment creditor, claimed that the money due the defendant in the attachment should be paid to the attaching creditors, to the amount of their claims, by the defendants in this suit, the owners of the land, citing: Brady *v.* Grant, 1 Jones 361; Baldy *v.* Brady, 3 Harris 103; Gochenauer's Ex'rs *v.* Hostetter, 6 Harris 414; Becker's Estate, 2 YORK LEGAL RECORD 47.

Abraham Wanger, for last attaching creditor.

Sept. 12, 1881. FUTHEY, P. J. Jacob Kulp, executor of Isaac Longenecker, deceased, sold certain real estate of the testator by virtue of his will, and, under its provisions, secured $1,700 of the purchase money on the land, by mortgage for the use of the testator's widow during her life. The will directs that after the death of the widow this sum of $1700, and another sum of $300, shall be paid to the executor, and that certain real and personal property shall be sold by him, and the moneys arising from all these sources be distributed by the executor among the testator's nine children. The widow is now deceased and the administrator d. b. n. c. t. a of Isaac Longenecker asks judgment against the owners of the lands thus sold, for the sum of $1,700 in their hands.

Three attachment executions have been issued on judgments against Nathan Longenecker, one of the children of Isaac Longenecker, in two of which the owners of the lands on which the mortgage rests were made garnishees, and the share of Nathan Longenecker in the $1,700 attached in their hands, the executor of Isaac Longenecker being then deceased and there being no distribution; and in the other, issued subsequently and since the substitution, the administratrix, &c., of Isaac Longenecker was made garnishee and the share attached in her hands.

The plaintiff in the attachment execution first issued, and served on the owners of the land, intervenes and objects to the share of Nathan Longenecker in the $1,700 being paid to the administratrix, alleging that it is bound by his attachment, and that the debtor must pay the money directly to him.

The Act of Assembly of July 27, 1842, relating to Foreign Attachments, enables creditors to attach "any interest which any person or persons may have in the real or personal estate of any decedent whether by will or otherwise.....in the hands or possession of the executor or administrator, or in whose hands or possession soever the same may be, as fully and effectually as in other cases;" and the Act of April 13, 1843, applies the provisions of this act to attachment executions.

We are of opinion that, under these

acts, and the subsequent Act of April 10, 1849, the share of Nathan Longenecker was attachable, either in the hands of the owners of the lands on which the mortgage rests, or of the executor or administrator; and that, in the distribution of that share, the attaching creditors are entitled to be paid according to the date of the service of the respective attachments, whether such service was upon the debtor, or the personal representative of the decedent. (Gochenauer's Ex'rs *v.* Hostetter, 6 Harris 414.)

But in whose hands should the distribution be made? The will directs the moneys secured by the mortgage, and in which the moneys attached are included, to be paid to the executor. He is to collect the moneys and make distribution. We think the better and simpler practice will be for the administratrix to receive the moneys directed to be paid, so that the administration account may exhibit the whole estate, and let the distribution be made in her hands to those entitled thereto. The payment of the moneys to the administratrix will not relieve them from the hold of the attachments served upon the debtor. They will still remain attached. These attachments were served at a time when there was no legal representative, and the moneys attached will pass into the hands of the administratrix bound by the attachment, just as if served upon her. The moneys being paid to the administratrix with notice or knowledge of the attachments served upon the debtor, they remain subject to the lien of the attachment in her hands. The object of the attachment, and its service, is to warn the garnishee not to pay over the money to the legatee; not to warn him to hold it as against the administrator charged with the settlement of the estate. The right of the attaching creditor is only the right of the defendant whose interest he attaches, and the defendant's interest is only in so much of the decedent's estate as may be left after the settlement of his estate. Any other course than a payment to the representative "would embarrass the settlement of estates and tend to dislocate the whole machinery of the law applicable to that subject." (Becker's Estate, in the Orphans' Court of York County, YORK LEGAL RECORD of May 26, 1881, and Lancaster Bar of July 9, 1881.)

We are not unmindful of the cases cited on behalf of the first attaching creditor, where, the estate being settled showing a balance sufficient to pay debts, the creditor was allowed to recover judgment on the attachment directly against the debtor holding the moneys of the estate. The case stated, however, on which our judgment must be based, does not inform us of the condition of the estate, although it was stated at bar on the argument; and in accordance with what we believe to be the better practice, we will direct judgment to be entered on the case stated in favor of the plaintiff.

SUPREME COURT.

Hunter v. Moul.

Contract — Collateral Security — Exchange of Securities.

The mere acceptance from a debtor of his own note, or the note of a third person, in case of an antecedent indebtedness, is not a payment of indebtedness. In the absence of a special agreement, it must be considered as a conditional payment or as collateral security.

One not a party to a note, but who has caused it to be drawn or endorsed or delivered over to a third person as a security, or has guaranteed the payment, is not entitled to notice of dishonor of it, but in an action on the original liability he may show in defense any injury he has actually sustained by the laches of the transferee. The fact that the collaterals were changed for other securities which were ultimately found worthless, change the liability unless it is further shown that a loss resulted to the owner of the collaterals by reason of such exchange.

A creditor has a right to retain all unpaid securities until he obtains satisfaction of the debt due him.

Error to the Court of Common Pleas of York County.

The Referee's report, containing all the facts of the case, will be found in Moul *v.* Hunter, YORK LEGAL RECORD 157.

The Court below filed no opinion, but dismissed the exceptions and confirmed the report.

The assignments of error related to such dismissal, and the confirmation of the report and entry of judgment thereon.

Cochran & Hay for plaintiff in error.

In addition to the authorities given in

Moul *v.* Hunter, *supra,* the following were cited:

The defendant below was injured by the arrangement betwen the plaintiff and Camp & Randall:

Southwick *v.* Sax, 9 Ward 122.
Nixen *v.* Lyell, 5 Hill 466.

The defendant was entitled to notice of dishonor of the Camp & Randall note:

Chamberlain *v.* Delarive, 2 Wilson 355.
Turner *v.* Stones, 1 D. & Loudes 131.
Price *v.* Price, 6 M. & W. 343.
Dayton *v.* Truell, 23 Ward 345.
Roger *v.* Langford, 1 C. & M. 637.
Lawrence *v.* McCalmont, 1 Howard 416.

John M. Young for defendant in error.

Hunter's liability was not discharged by the Camp & Randall note:

Weakly *v.* Bell, 9 Watts 280.
Leas *v.* James, 10 S. & R. 307.
McGinn *v.* Holmes, 2 Watts 121.
Reed *v.* Deftebaugh, 12 Harris 495.
League *v.* Waring & Co., 4 Norris 244.
Muldon *v.* Whitelock, 1 Cowen 306.
Strong on Promissory Notes § 404.
Byles on Bills, 370.
Daniels on Negotiable Instruments, §§ 1271-1278.
2 Parsons on Notes and Bills 184.

This undertaking was binding on Hunter until the debt was paid:

Mahone *v.* Keener, 8 Wright 107.
Taylor *v.* Preston, 29 P. F. Smith 436.
Brown *v.* Burtis, 2 Comstock, 229.
Johnston *v.* Gilbert, 4 Hill 178.

Moul was guilty of negligence in this matter, and is therefore not liable for the failure of Camp & Randall to pay the drafts:

2 Parsons on Bills and Notes 184.
McLugan *v.* Bovard, 4 Watts 308.
Chitty on Bills 98.
Laurence *v.* McCalmont, 2 Howard 726.
Ormsby *v.* Fortune, 16 S. & R. 205.
Hanna *v.* Holton, 28 P. F. Smith, 337.
Insurance Co. *v.* Marr, 10 Wright 504.

October 3, 1881. MERCUR, J. This judgment was entered on the report of a referee. The important facts found by him are substantially these: Hunter was indebted on book account to Moul in the sum of some eleven or twelve hundred dollars. On being asked for payment, he replied he had no money, but had the promise of a note of $900 from Camp & Randall, payable in four months, and that he would give that to Moul to get discounted and use the money. The latter answered that he did not want the note, but that Hunter should get it discounted and give him the money. To this Hunter replied he was a stranger, and could not get it discounted, but that Moul should take the note and get it discounted, and he, Hunter, would stand for it and see it was paid. Moul assented to this. The note was made payable to him and sent to him. It was not indorsed by Hunter. Moul had it discounted at bank and received the proceeds. When it matured it was protested for non-payment and taken up by the defendant in error. In lieu thereof, and soon thereafter, he took from Camp & Randall their two drafts of $450 each, payable at twenty and thirty days respectively, and wrote Hunter informing him of the fact, but rereived no answer. The draft first falling due was paid at maturity, the other was protested for non-payment, and Moul wrote Hunter informing him thereof. This draft remained in the hands of the defendant in error. Treating it as no payment, he seeks to recover of the plaintiff in error, on the original account a sum equal to the amount of the draft.

The contention is whether the circumstances under which the defendant in error took the note, or his subsequent action in relation thereto, compelled him to apply it as a payment on the account against the plaintiff in error. There was no express agreement to accept the note as payment nor to give time for the payment of the account. The referee found the note was not taken by the defendant in error, as absolute payment of so much of the indebtedness of the plaintiff in error, and technically not as collateral security therefor, but inasmuch as paper so held has been called collateral by the courts, he treats it as such. He further found the defendant was guilty of no negligence in failing to collect the note, and that he did not so convert it to his own use as to bar his right to recover of the plaintiff in error.

The mere acceptance from a debtor of his own note, or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement, it must be considered as a conditional payment or as collateral security. The debtor continues liable for his own debt in the event of a failure of payment of the note thus given or transferred: *Leas et al. v. James,* 10 S. & R. 307; *Maginn v. Holmes,* 2 Watts 821; *Weakly v. Bell et al.,* 9 *Id.* 273; *M'Intyre v. Kennedy et al.,* 5 Casey 448; *Brown et al. v. Scott,* 1 P. F. S. 357; *Logue v. Waring & Company,* 4 Norris 244.

When the transfer of a note is a conditional payment, it is necessary to in-

quire what the true condition was, and if not fulfilled by the person accepting it, what injury, if any, has resulted from the breach. The cases are not in harmony, as to the effect of a failure to present the note of a third person and give notice of its dishonor when no injury therefrom has resulted to the debtor. We shall not attempt to review them, but refer to some which we think correctly rule this case. Great regard must be had for the character of the transaction. If the debtor indorse the note, a more stringent rule prevails as to notice than if he transferred it by delivery only. When the guarantee is absolute, that a specific act shall be done by another, it was said in *Vinal v. Richardson*, 13 Allen 521, demand and notice need not be averred, although the want of them may be a defense on the ground of negligence to the extent of the resulting injury. One who has merely guaranteed it, but whose name is not on the bill or note, is not in general entitled to notice of non-payment. Chitty on Bills, 498. So on page 441, it is further said in general if the bill or note be given as collateral security and the party delivering it were no party to it, either by indorsing or transferring it by delivery when payable to bearer, but merely caused it to be drawn or indorsed or delivered over by a third person as security, or has merely guaranteed the payment, it has been considered that he is not within the custom of merchants an indorser or party to it, so as to be absolutely entitled to strict regular notice, nor discharged from his liabilities by the neglect of the holder to give him such notice unless he can show by express evidence, or by inference, that he has actually sustained loss or damage by the omission. The reason is, when a person delivers over a bill to another without indorsing it, he does not subject himself to the obligations of the law merchant, and cannot be sued on the bill. As he does not subject himself to the obligation he is not entitled to the advantages. If he can prove he has sustained damages, then he is discharged only to the extent of such actual damages. *Id.* The guarantor of a note does not stand in the same situation as parties to it. His obligation is in the nature of an insurance of the debt, and there is no need of the same proof to charge him as if he was an endorser. The necessity of demand in order to charge the indorser of a bill is solely grounded on the custom of merchants, and applies only to actions against the indorser on the bill itself. It does not apply when the guarantor is not an indorser: *Gibbs v. Cannon*, 9 S & R. 201; *Overton v. Treacy*, 14 S. & R. 311; *M'Lughan v. Bovard*, 4 Watts 308. The law is clearly stated in 2d Parsons on Bills, 184, where it is said if paper be transferred by delivery only as security for pre-existing debt, and it is dishonored while in the hands of the transferee, it affects in no way the debt it was intended to secure. The original liability remains what it was, and upon dishonor of the paper, it is not even necessary to give him notice thereof as an indorser, but the debtor may show in defense any injury he has sustained by the actual laches of the creditor. Nor does the fact that the collaterals were exchanged for other securities which were ultimately found worthless, change the liability unless it is further shown that a loss resulted to the owner of the collaterals by reason of such exchange: *Girard Fire and Marine Insurance Co. v. Marr*, 10 Wright, 504.

The name of the plaintiff in error was neither in or on the note. It was not payable to bearer. He was in no sense a party to it. With a view that the proceeds when paid should discharge an amount of his indebtedness equal thereto, he caused it to be made payable to his creditor and put into his hands. Through no fault of that creditor it was not paid. It is not shown that it could, at any time, have been collected of the makers. The acceptance from the makers of their two drafts was no payment, but did result in the payment of one-half the amount. Having sustained no loss or damage by any act of his creditor, the plaintiff in error has no just cause of complaint at being still held liable for his indebtedness. The creditor was not obliged to give up the unpaid draft before bringing this suit. It is not shown to be of any value, but if valuable he has a right to retain all the securities in his hands until he obtains satisfaction of the debt due him.

Judgment affirmed.

YORK LEGAL RECORD.

VOL. II. THURSDAY, OCTOBER 20, 1881. NO. 33.

COMMON PLEAS.

Leidig v. New Era Life Association.
Ottemiller v. The Same.

Practice—Change of Venue—Discretion of the Court.

Under the provisions of the Acts of 14th of April, 1834, 2 Purd. Dig. 1227, pl. 72, and April 28, 1870, ib. 1164, pl. 2, providing for a change of venue in certain cases, there was no discretion permitted to the Court; in case the proper affidavit was filed—the right of removal then became imperative.

Under the Act of March 30, 1875, P. L. 35, however, the removal of a cause is within the discretion of the Court.

An affidavit alleging that owing to the large number of people interested in speculative insurance in the county, and the fact that the company defendant did not engage in such speculative insurance, had so prejudiced a large number of the inhabitants of the county against the company defendant that a fair trial was impossible, unsupported by further proof, supposes a condition of things so greatly exaggerated that it cannot be entertained for a moment, and does not furnish a sufficient cause for removal.

The mere fact that the merits of the case have been discussed in the public newspapers, does not furnish sufficient cause for a change of venue.

Motions on behalf of the defendant for change of venue.

Cochran & Hay and *W. Henry Smith* for motions.

E. W. Spangler and *W. C. Chapman*, contra.

October 18, 1881. WICKES, A. L. J.

The Acts approved April 14, 1834, 2 Purdon 1227, pl. 72, and April 28, 1870, ib. 1164, pl. 2, providing for a change of venue in certain cases, permitted no discretion to the Court in cases in which the affidavits provided for by the Acts were filed. The right of removal was imperative when the defendant had performed the only condition required by the Acts.

But the Act approved March 30, 1875, P. L. 35, provided for a removal for the reasons mentioned in Section 1, if the Court or Judge is "satisfied of the truth of the facts alleged," and when the application is made under the 3rd section, the Court may refuse or award such change of venue as in its discretion it shall see fit."

The application pending before us is made under the fifth specification of Section 1, and the third of Section 3.

The ground is substantially the same—viz: that a fair and impartial trial cannot be had in this county, and for the reason contained in said fifth specification, that a large number of the inhabitants of the county have an interest in the question involved in this suit adverse to the applicant.

The affidavits filed with the petition are all directed to the establishment of the fact that speculative insurance has taken such a hold upon this community, and is so generally engaged in, that it has created a prejudice against the company defendant, because it has declined insurance of that character. Apart from the counter affidavits presented, and which directly charge the said company defendant with the very practice of which it complains, we are not satisfied that such an impression has been made upon the opinions and morals of this community by the speculative companies existing here, as to deprive a suitor of a fair and impartial hearing by the juries selected for that purpose. That such companies have an existence here is true, and it is a reproach to the county that they have obtained dupes enough to give them a foothold. But the opposition to such companies is marked and decided among intelligent and right thinking men, quite sufficient to overcome the evil influences complained of in this petition. It is not long since the matter was brought to the attention of the Grand Jury, and that body responded in a report, signed by all its members, severely condemning the system and calling upon the Legislature to pass appropriate laws to prohibit and punish the evil. Certainly on the part of that jury there was no disposition shown to strengthen the hands of such companies, nor do we know of any public utterance or act that can be so construed.

But assuming the gambling spirit of speculative insurance to be as prevalent as is intimated in the affidavits presented by the petitioner, how does that constitute an interest adverse to the company defendant?

That those engaged in corrupt insurance are hostile to all companies doing a legitimate business, seems to us a *non sequitur*. It is not asserted or proved that the company defendant has been made the special mark of such displeasure, even supposing it to exist; and the same reasoning urged in its behalf would apply to every other company that may be sued in this jurisdiction. We must first determine that it is not a speculative insurance company and has lost its business here, for that reason, both of which facts, are denied in the plaintiff's affidavits. And further, that the corrupt spirit of speculative insurance has so leavened the mass of this community that a fair and impartial trial is impossible in our courts; a condition of things so greatly exaggerated, that we cannot entertain it for a moment. That the merits of these cases, or either of them, have been discussed in the public prints, is a matter of regret. But the motives underlying such publications are so generally suspected, that it is safe to say, but little, if any impression is made by them on the public mind. If this want of faith needed a justification, it is found in this case, for it appears that one of the plaintiffs, by the hand of one of her counsel, resorted to this impersonal defence to the alleged charge made against her; a defence which we can but think would have been fairer to herself and the public, had it appeared over her own signature.

We therefore refuse to award a change venue.

ORPHANS' COURT.

O. C. of Luzerne Co.

Gray's Estate.

Injunction—Foreign executor.

Gray died in New Jersey, owning a mortgage on lands in Pennsylvania. His will was proved and letters were granted in both States: HELD, that the mortgage should be accounted for in New Jersey, unless collected by some process of the courts of Pennsylvania.

The acting executor assigned the mortgage to a citizen of New Jersey. The surety of the executor in Pennsylvania complained that the executor was insolvent, and that the assignment was fraudulent, and prayed the Court to restrain the executor and his assignee from collecting the mortgage by process in the Court of Common Pleas. HELD, first that the Orphans' Court had no jurisdiction over the assignee, not being served with process in this State; and second, that as the mortgage was not an asset in this State, the surety was not a party interested.

Citation on executor to give counter-security.

October 10, 1881. RHONE, P. J. This decedent died in 1873, in the State of New Jersey, and a resident there. He left a will, wherein he appointed his two sons, John and Alexander, executors. The will was duly probated, and letters testamentary were granted to the said executors both in the State of New Jersey and here. In the grant of letters here Josiah Lewis, the petitioner, became one of the sureties in a bond prescribed by our act of Assembly.

As a part of his personal estate, the decedent left a claim of some seventeen thousand dollars against Charles Hutchinson, which is secured by a mortgage on lands situate in this county, which claim was inventoried, and has been accounted for by the executors in Middlesex county, in the state of New Jersey. Hutchinson is insolvent, and A. H. Reynolds is his assignee.

The petitioner now alleges that John Gray, who has been the acting executor, has assigned the said mortgage to one A. S. Meyrich, a citizen of New Jersey, without consideration, and for the sole purpose of defrauding the estate of the decedent, that said Meyrich, by his attorney, has proceeded by *scire facias* and execution, in this county, to collect the said mortgage. The petitioner further alleges that by reason of the premises the said John Gray is wasting and mismanaging the estate, and that he is insolvent, praying that he be compelled to give counter-security, or be discharged.

On this showing the court issued a citation to the executor to answer the charges made against him, and we also issued preliminary injunctions against all parties connected with the said mortgage, restraining them from proceeding in the collection thereof, until the complaint against the executor should be disposed of. The process was served on Meyrich

personally in New Jersey, and he made answer that he was out of the jurisdiction of the court, and declined to submit himself to its decrees; whereupon the injunctions were dissolved as to him.

The citation to John Gray, to show cause why he should not give counter security, etc., is still pending, as is also the rules to show cause why the injunctions shall not be dissolved as to the other parties. Affidavits were filed on the part of the petitioner on the return day of the rules for dissolving the injunctions, and on same day a list of judgments against John Gray was filed. Counsel for Gray and Meyrich objected to the reading of these affidavits, on the ground that they were not filed in time, but in the absence of any rule of court on the subject, and the counsel declining to ask for further time for a hearing, the court proceeded to hear the case as then presented. The answers of Gray and Meyrich were then filed, and the argument of counsel heard. These answers are not at all specific on the subject of the alleged assignment. They state in technical terms legal conclusions. They nowhere allege that the assignment was *bona fide,* and for value.

The conclusion to which we have come on a single question settles the whole case, for we have concluded that the fund arising from the sale of the mortgage, as well as the mortgage itself before the sale, is not an asset for which the petitioner is or may become liable.

It must be kept in mind that the assignment of the mortgage was made to a citizen of New Jersey, and by virtue of the letters granted to the executor there. It is not the executor who is now seeking to collect the mortgage by process here, but is his assignee.

It has been decided by the Supreme Court of the United States that railroad bonds, secured by a mortgage on the road are mere *choses in action,* and are only liable to taxation at the domicil of the owners thereof. C. P. & A. R. R. Co. *v.* Commonwealth of Pennsylvania, 4 Brewster 183.

The choses in action, such as bonds, stocks, etc., of a decedent, are not domiciled at his death in Pennsylvania, and not liable to collateral inheritance tax under our laws. Kintzing *v.* Hutchinson, 34 Leg. Int. 365; Allen *v.* Philadelphia, Saving Fund Society, 36 Leg. Int. 204; Orcott's Appeal, 38 Leg. Int. 194.

The precise point here raised does not seem to have been ever settled in this State. Shakespeare *v.* Fidelity Trust Company, 38 Leg. Int. 124.

In Baldwin's Appeal, 31 Sm. 441, a decedent in Pennsylvania, had assets in New York; administration was granted there to the Pennsylvania administrator, who filed an inventory in New York, including a mortgage on property in New Jersey, where no administration had been granted. The administrator settled an account in Pennsylvania without charging himself with the mortgage, on the ground that he had to account for it in New York. *Held,* that he was accountable for it here.

So, for the reasons given in the case last cited, we hold that the executor must account for the mortgage in question in New Jersey. If he had collected it here by virtue of letters granted here, we would not hesitate to call him to an account here. Dent's Appeal, 10 Har. 514; Freeman's Appeal, 18 Sm. 151; 1 Williams on Executors, 426 and note, ed. 1877.

The money, if any has been paid, was paid in New Jersey, and there let it be distributed; and if none has been paid, it is proper that the courts there should settle the matter, as they have jurisdiction over all the parties and the estate. The whole matter of the assignment arose there before our courts were invoked for any process.

And now, October 10th, 1881, the rules in this case, to show cause why the injunction orders shall not be dissolved, are

made absolute, at the cost of the petitioner.

A Rickets, Esq., for executor.

J. G. Miller, Esq., *contra.*

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Attachment—Act of 1869—*Trespass.*—The sheriff has no authority under the attachment Act of 1869, when the attachment is issued against one person, to seize the goods of another. If he does so, he will be liable in trespass.—*Rothermel v. Marr,* 38 Legal Intelligencer 373.

Borough — Liability of — Riot.—The municipality of a borough is not responsible for an injury negligently inflicted, on one citizen through the riotous or unlawful conduct of certain other citizens. The conservation of the peace is a great public duty put by the Commonwealth into the hands of public officers; the judges, justices of the peace and mayors, the governor, sheriffs, constables and policemen; hence cities and boroughs can no more be charged with damages resulting from their misconduct, than can counties, townships, or the State at large. —*Borough of Norristown v. Fitzpatrick,* 38 Legal Intelligencer 372.

Justice of the Peace—Transcript.—A Justice of the Peace cannot certify a transcript after his term of office has expired.—*Singley v. Fisher,* (Schuylkill C. P.) 2 Schuylkill Legal Record 168.

Married woman—Sole and separate use.—Property held to the "sole and separate use" of a married woman is an *equitable estate,* and as such can not be encumbered or conveyed by her, unless empowered by the instrument under which she acquires title.—*Towson v. Brown,* (Lancaster C. P.) 13 Lancaster Bar 84.

Negligence — Contributory—Rule applicable to constitute.—Where a man, driving a quiet team, was thrown from his seat by a jolt in crossing a defective gutter, yet was in no peril at the time, afterwards in walking out from between the horses, pulled them up against a fence, the breaking of which frightened them and made them run away, causing the wagon to pass over his body, thus killing him, HELD, that he was guilty of contributory negligence. The general rule to correctly ascertain the proximate cause of an accident is that "the injury must be the natural and probable consequences of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been seen by the wrongdoer as likely to flow from his act."—*City of Lancaster v. Kissinger,* 13 Lancaster Bar 77.

Sheriff's sale—Lumped sale—Irregularity.—Three contiguous tracts of land, held by the same defendant but by separate deeds, were advertised separately and afterwards sold as one tract. HELD, that this irregularity, coupled with gross inadequacy of price, and a stringent rule as to payment of purchase money, was sufficient to justify the setting aside of the sale. The fact that several properties were lumped at the request of the purchaser, and sold by the sheriff as one, is sufficient to cast the onus upon those seeking to sustain the sale of showing that the price was at least as large as could have been obtained by selling separately.—*Smith v. Tinicum Fishing Company,* (Delaware C. P.) 1 Weekly Reporter 121.

Opening of judgment—Form of Issue.—When a defendant asks to have a judgment opened on the ground of breach of warranty, denying any liability whatever, he will be liable for all the costs of the issue if there is a recovery for any sum, and therefore there is no necessity for a collateral issue, and it will be framed in the usual way.—*Huges et al. v. Hart,* (Luzerne C. P.) 10 Legal Register 261.

YORK LEGAL RECORD.

VOL. II. THURSDAY, OCT. 27, 1881. No. 34.

SUPREME COURT.

Dale v. Knapp.

Contract—Subscriptions made on Sunday—Liability for.

The support of religious societies is a charity in a broad Catholic sense, and whatever is morally fit and proper to be done on Sunday in furtherance of the great object, is likewise charity.

A subscription made on Sunday towards the erection of a church, is a well recognized charitable work of active goodness. It is not prohibited by the Act of 22d April, 1794, and an action will lie to enforce payment of such subscription.

Error to the Court of Common Pleas of Clearfield county.

October 3, 1881. MERCUR, J. This contention is whether a subscription made on Sunday toward the erection of a church edifice is void.

A contract made on Sunday is not void at common law; Kepner *v.* Keefer, 6 Watts 23; Fox *v.* Mensch, 3 W. & S. 446; Shuman *v.* Shuman, 3 Casey 90. If then this contract is void it is by reason of the Act of 22d of April, 1794. That act declares: "If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted," and such other exceptions as are mentioned in the proviso, every person so offending shall be subject to a penalty as in the act prescribed.

It may be conceded that the making of this subscription is not a work necessarily done on Sunday. The question then is whether the raising of money to build a house of worship is a work of charity within the meaning of the act, or is the solicitation of contributions for that purpose from a congregation assembled on Sunday for religious worship, a work of charity?

No man can legally be compelled to contribute towards the erection of a house for public worship, nor to attend or support religious services therein. The statute imposes no such obligations. It, however, does recognize Sunday as the proper day for public worship. It leaves every one free to use the day for that purpose, or refrain from such use. It is designed to compel a cessation of all those employments which will interfere with or interrupt the exercise of religious services, either public or private, on that day. The right to so worship is protected by its penal enactments. Each person has an indefeasible right to worship Almighty God according to the dictates of his own conscience. Each is at liberty to use Sunday for the purpose contemplated by the statute. If he refrains therefrom, he shall not so use the day as to annoy others who may be engaged in religious worship; Johnson *v.* Commonwealth, 10 Harris 102. The purpose of the law is to protect the day for the comfort of those conducting or attending religious worship. Charity is active goodness. The means which long established and common usage of religious congregations show to be reasonably necessary to advance the cause of religion are not forbidden, and may be deemed works of charity within the meaning of the statute. It is not essential that they be purely charitable. It is sufficient if they so far partake of that character as to be recognized by the congregation as a part of its active goodness, and are not expressly forbidden by the statute; Commonwealth *v.* Nesbit, 10 Casey 398.

The inclination of this court has long been not to permit a person to set up this law against another person from whom he has received a meritorious consideration or on whom he has inflicted an injury. It was therefore said in Mohney *v.* Cook, 2 Casey 342, that the law relating to the observance of the Sabbath defines a duty of the citizen to the State and to the State only. It was there held, that one who had erected an obstruction in a navigable stream whereby the boat and cargo of another were wrecked on

Sunday, could not, in an action for such injury, set up as a defence that the plaintiff was unlawfully engaged in navigating his boat on that day. So it was held the hiring of a carriage on Sunday by a son to visit his father created a legal contract, although no reason was shown for visiting him on that day, other than flows from a general filial duty and affection; Long *v.* Mathews, 6 Barr 417. It is not a violation of the act for a hired domestic servant to drive his employer's family to church on Sunday in the employer's private carriage; Commonwealth v. Nesbit, *supra.* A will executed on Sunday is not void, although at the time the testator be in his usual state of good health and live five or six months thereafter; Beitman's Appeal, 5 P. F. Smith 183.

Contracts for services on Sunday of the preacher, the sexton, the organist and the singers are not illegal, although these persons may engage in such employment as a means of livelihood. Their services are in furtherance of the same great charity.

The custom of soliciting contributions on Sunday from congregations assembled for religious worship, is very general, and has existed from an early period of time. With some denominations it may be for a greater variety of objects than with others. Sabbath offerings may be for the incidental expenses of the church; to light and warm the house; to pay the organist and the sexton; to assist the poor; to repair, enlarge and rebuild the church edifice; to support foreign and domestic missions. The latter often extend to furnishing aid to poorer congregations toward erecting houses of worship. If it be illegal to give or agree to give for such objects on Sunday, it must be illegal to solicit the giving. We are not aware that it has ever been held that the preacher became liable to the penal provisions of the statute by soliciting from the pulpit such contributions, nor any of the officers of the church for taking up the collection. Whether the sum be large or small does not change the principle applicable to the transaction.—It is true there is a legal distinction between having given and agreeing to give, yet inasmuch as we think a subscription towards the erection of a house of public worship is a work of charity, such agreement is not prohibited by the Act of 22d of April, 1694. The conclusion at which we have arrived is not in accord with the doctrine assumed in Catlett *v.* The Trustees, etc., 62 Indiana 365, but in principle it is in harmony with the rule declared in Flagg *v.* Millburg, 4 Cushing 243; Bennett *v.* Brooks, 9 Allen 118; Doyle *v.* Lynn et al., 118 Mass. 195, and directly sustained in Allen *v.* Duffy, decided last year by the Supreme Court of Michigan, and reported in 9th volume of the Reports 646.

The support of religious societies is a charity. It is a giving for the love of God, or the love of a neighbor in a broad Catholic sense. Whatever is morally fit and proper to be done on Sunday in furtherance of the great object, is likewise a charity. The learned judge, therefore, erred in ordering a non suit and in refusing to take it off.

Judgment reversed, and *procedendo* awarded.

Wages—Lien of—Notice to Sheriff.—Notice was served on the Sheriff, before the sale, on behalf of the laborers, stating that the claims (which appeared below in a list of names, with the amounts opposite) were for "labor performed, the wages of which is a preferred claim," and requesting the Sheriff to retain the respective sums set opposite their names out of the proceeds of the executions, reciting the defendants by name, but not referring more particularly to the process. *Semble,* That such notice is sufficient.*—*Bowers v. Bowers Bros.,* (Chester C. P.) 1 Chester County Reports 273.

*As to sufficiency of notice, see Hoffacker *v.* Hoffacker, *ante* 104. and Bennet's Estate, *ante* 126.

COMMON PLEAS.

C. P. of Delaware Co.

Haycock v. Thatcher.

Practice — Promissory note — Variance between copy filed and the writ—Summons in case, in action upon sealed note—Amendment.

A variance between the process and the precipe is amendable by the clerk, as of course, without a rule.
A summons is only a process by which the defendant is brought into court, and a variance between it and the declaration or copy filed, cannot be pleaded, since oyer of the writ is no longer allowed.

Whether attaching a seal to an ordinary promissory note without anything else, is sufficient to convert it into a deed, *dubitatur.*

Rule for judgment for want of a sufficient affidavit of defence.

This was an action upon the following note:—

$700. CITY OF CHESTER, April 1st, 1867.

One year after date, I promise to pay Charles Haycock seven hundred dollars, for value received, with lawful interest for the same.

Witness present: JAMES S. TYSON } ENOS THATCHER. [L. S.]

The precipe for a summons was in the usual form, but did not specify the kind of writ; upon which the prothonotary issued a summons in *case.*

The defendant filed an affidavit of defence in which the sole allegation was that "the claim of the plaintiff is founded upon a note under seal, and he is advised and believes that the said action being a suit in assumpsit, cannot be maintained on said sealed note."

The plaintiff then took this rule, and after argument, the Court rendered the following opinion:

CLAYTON, P. J.—

The precipe contains a true copy of the instrument sued upon—which is a promissory note with a seal opposite the maker's name. The precipe directs the Prothonotary to "issue summons in the above recited case returnable the 1st Monday, June, 1880.

The Prothonotary, instead of issuing a summons for *debt,* made out the writ in *case.* The affidavit of defence pleads the variance between the copy filed and the writ. There is no allegation of any other defence. It will be observed that the precipe does not name the kind of writ required; it, however, gives a copy of the sealed instrument and demands a summons. The Prothonotary is presumed to be familiar with all the forms of original process, and therefore the error in the form of the writ must be considered purely clerical. This being the case the process was amendable at common law without giving any advantage to the defendant. It has always been held that the process is amendable by the precipe, and that any variance between them is merely clerical and amendable by the clerk, as of course, without a rule being required for that purpose. Regarding the summons therefore with the precipe, the form of action is not *case* but *debt,* and the plaintiff on this ground alone is entitled to judgment. See the statute of 8 Hen. VI. C. 15; Rob. Dig. 33, in which it is declared that any mistake or defect which can be attributed to the misprision of the clerks, may be amended even after error brought. "Original process is amendable through misprision of the clerk, at any time, provided there be something to amend by"; 7 T. R. 298; 2 Smith 332; 1 H. Al. 291; 1 B. & P. 342. The only exception to the rule is in bailable cases where the bail may be affected by the amendment.

In practice the amendment is not actually made but is considered as done by the courts; Langer *v.* Parish, 8 S. & R. 135. See also 14 Ed. III. C. 6 Robert's Dig. 27. In the language of the statute it is to be amended without giving the challenger any advantage. The plaintiff could file a declaration in debt without further notice of the error in the process, and the rule is, that if the process will admit of a declaration in the form of law agreeable to the copy of instrument filed, the defendant can not plead a mere clerical variance between the writ and narr., and as the narr. is dispensed with in actions on notes and bonds, the affidavit required cannot set up a defence that could not be pleaded at common law.

It is not necessary, therefore to decide whether the instrument sued upon is or is not a specialty. It is very doubtful whether it can claim that dignity. It has nothing but the seal to designate it as a specialty. It wants the usual words, "Witness my hand and seal," or "In witness whereof the parties have hereunto interchangeably set their hands and seals." It contains no other words indicating the intention of the parties to make a deed. It is very doubtful if the mere placing of a seal opposite the maker's name can have the magic effect of converting a simple contract into a deed. It has been held that the formal declaration of the parties by their assertion that the parties had thereunto set their hands and seals, but neglected to actually put on the piece of wax or paper, did not make the instrument a deed. If the mere fixing of a piece of wax on paper, or the mere making of a scroll opposite the name of the maker of a due bill, without more, will convert it into a deed with all its solemn privileges, the temptation to fraudulently affix such a seal to resuscitate a legally dead instrument, or to make it prove itself by its antiquity, will certainly be very great. One would have nothing to do but wet with his tongue one of the paper seals sold by the box for a few cents by the stationers, and affix it without the scratch of a pen, upon some old promissory note, paid and forgotten a dozen years ago, and twice barred by the statute of limitations, to bring it again into full life. This could be done with impunity when the maker was dead, but if the law, as I apprehend it does, requires some evidence, either upon the paper itself, or *aliunde*, that the parties intended it as a deed, then such frauds could not be perpetrated.

There is still another view to be taken of the case. By the practice of the courts, oyer is not allowed of the original writ, and the variance between it and the declaration can no longer be pleaded. The summons is only regarded as the process by which the defendant is brought into court. When once in court the plaintiff may declare in any form, regardless of the form of the writ. A summons may issue in *case*, and the declaration be in ejectment. The only possible mode of taking advantage of the variance would be to crave oyer of the writ, and plead the variance in abatement. This was formerly permitted, but, as the practice of the English courts stood at the period of our Revolution, and as it has been followed in our courts, oyer of the writ was and is refused, and advantage could not be taken of the difference between the writ and subsequent proceedings. See 1 Ch. Pl. (old ed.) 244, 252, 253; Overseers *v.* Bumm, 12 S. & R., 295; Dillman *v.* Shultz, 5 S. & R. 35. It must follow that if the writ cannot be looked at to discover a variance between it and the declaration, it cannot be examined to prove the same between it and the copy sued upon.

Judgment for plaintiff.

Husband and wife—Power of attorney.—A power of attorney from a wife to her husband to act for her in the settlement of an estate should be properly acknowledged as in the form required by the Act in reference to real estate.—*Dampf's Appeal,* 13 Lancaster Bar 86.

Justice of the Peace—Appeal from—Execution.—If an appeal from a judgment of a Justice of the Peace has not been entered in the Common Pleas, the Justice may issue execution, without a certificate from the Prothonotary that the appeal has not been entered.—*Carpenter v. Mills,* (Schuylkill C. P.) 2 Schuylkill Legal Record 162.

Receiver—Action by.—Where a receiver of a corporation sells goods or parts with property in his possession, the action to recover the price or value thereof should be in the name of the receiver. —*Philadelphia & Reading Coal and Iron Co. v. Schada,* (Phila. C. P.) 38 Legal Intel. 392.

YORK LEGAL RECORD.

VOL. II. THURSDAY, NOV. 10, 1881. NOS. 35-36.

COMMON PLEAS.

Flynn et ux. v. Metzgar.

Husband and Wife—Separate property of wife—Assignment.

F. bought a tract of land for $500, paying $100 cash, and giving a judgment note for the balance of the purchase money. One year afterwards by assignment on the back of the deed, he assigned the property to his wife, the assignment reciting a consideration of $500, but no money passing between the parties at the time. This assignment as well as the deed was never recorded. At the time of the assignment the husband's indebtedness exclusive of the unpaid portion of the purchase money, amounted to $4.82. Various payments were made on the balance due on the property by husband and wife, until finally the amount was reduced to $140.50, for which a mortgage was given. The property was assessed in the name of the husband at times, and at other times in the name of the wife, and some of the taxes were paid by the wife. By representing the property to be his, F. obtained credit, and the premises were eventually sold upon judgments obtained for his indebtedness. In an action of ejectment brought by the wife against the Sheriff's vendee. HELD, that as the Referee found as a fact that the wife's money was not used in the purchase of the property, she was not entitled to recover on the ground of a resulting trust.

A husband may make a voluntary assignment of all his estate unto his wife, if such assignment is not intended as a fraud upon existing or prospective creditors.

If the payments for the property conveyed had been completed or secured at the time the assignment was made from F. to his wife, so that the property conveyed to her would have been subject to the lien of the purchase money, or if the failure of such lien had been accounted for as the omission of those to whom the judgment note was given, the plaintiffs would have been entitled to recover even though she failed to have it recorded (there being no evidence that she *concealed* the fact of the assignment, and notwithstanding his fraudulent representation subsequently as to the ownership of the property.

There being no evidence of such completion or security of payments, the assignment to the wife was invalid, and the husband's representations become evidence for the purpose of showing the fraudulent means resorted to to complete a title which could only stand against the husband's creditors when honestly established.

Exceptions to Referee's report.

The report of the Referee is as follows:

This is an ejectment for a tract of land containing four acres, situate in Carroll township, York county, Pennsylvania, described in the writ, the possession of which is, and was at the impetration of the writ, in John B. Metzgar, the defendant; and the title and right to the possession of which the plaintiffs claim to be in Margaret J. W. Flynn (otherwise and usually called Jennie Flynn) one of the plaintiffs.

The Referee finds the following facts: James Flynn was married to Margaret J. W. McBride in October, 1869. On April 1, 1872, Rebecca Swartz, Jacob Swartz and wife, and Reuben Swartz and wife, late widow and heirs of John Swartz, deceased, by deed of that date, conveyed the premises in dispute to James Flynn, aforesaid, in consideration of the sum of $500, of which he paid $100 on the delivery of the deed, and for the balance of which, viz: $400, he executed his note with warrant of attorney to confess judgment. This note was not offered in evidence, and no evidence was offered to show whether or not judgment was entered upon it. On April 1, 1873, by an assignment on the back of the deed from the Swartz's, he assigned to his wife all his interest in the premises in dispute, which assignment was signed and sealed and acknowledged before Esq. Richey Clark, who signed the same as a subscribing witness. The assignment recited a consideration of $500, but no money passed betwen the husband and wife at the time. James Flynn, his wife and her father, John McBride, were present at the Esq.'s office. There is no evidence in regard to the delivery of the assignment of the husband to the wife, unless a presumption of delivery arises from Esq. Clark's testimony that Flynn signed, sealed and acknowledged the assignment in his presence, and from the assignment itself. The deed and assignment were produced on the trial before the referee by Mr. McElroy, of counsel for the parties plaintiff. Neither the deed from the Swartz's, nor the assignment from Flynn to his wife, were ever recorded.

Flynn and his family entered into possession of the premises in dispute on Mar. 31, 1872, and continued in possession until dispossessed in October, 1880, by the sheriff's vendee, as hereafter stated. From the date of the conveyance by the Swartz's up to April 25, 1878, payments were made to them, or Esq. Clark, their agent, on account of the principal

and interest of the judgment note given for the purchase money, which payments aggregated $456.15, Mrs. Flynn in person paid some, and the other payments were made by James Flynn. On November 1, 1879, Margaret J. W. Flynn, the plaintiff, and her husband, executed to Mrs. Rebecca Swartz their bond and mortgage for $140.50 the balance of the original purchase money judgment note then remaining unpaid; said mortgage is still unpaid. On the first of April, A. D. 1873, James Flynn was indebted to Geo. Lau in the sum of $4.82, and to the Swartzes in the amount of the then unpaid balance on the note given for the purchase money of the premises in dispute, and there is no legal evidence of any other indebtedness by him at that date.

That on January 8, 1880, a judgment was entered in the Court of Common Pleas of York county, Elcock, Metzgar & Co., plaintiffs, *v.* James Flynn, defendant, for $69.80, on a transcript from the docket of Esq. Emmanuel Myers, J. P. This judgment was No. 92 January Term, 1880.—That on February 4, 1880, a judgment was entered in said Court, H. C. Smyser, plaintiff, *v.* James Flynn, defendant, No. 195 January Term, 1880, $159.93, on a transcript from the docket of Esq. Myers, J. P. The note which was the foundation of the latter judgment was a judgment note given to the plaintiff, partly to secure him as accommodation endorser on a note for $75 drawn by James Flynn, and discounted at the Dillsburg Bank, and partly for a lumber bill due to Smyser by Flynn. Smyser was induced to endorse Flynn's note in bank, and accept the judgment note as security for that and his unpaid lumber bill, by Flynn's assertions that the property now in dispute was owned by him; that he had the legal title and that he only owed on it two payments of $75 each. Elcock, Metzgar & Co., were induced to grant Flynn the credits which ultimately resulted in the above judgment in their favor, by similar representations made to them by him.

On the above stated judgment of H. C. Smyser there was issued *fi. fa.*, No. 38 April Term, 1880, on which the premises in dispute were levied and condemned as the property of James Flynn; also *vendi. exponas* No. 58, April Term, 1880, on which the property in dispute was sold as the estate of James Flynn, to John B. Metzgar, for $50. At the time of the sheriff's sale, and before the premises in dispute were struck down, Mr. McElroy, as counsel for Mrs. Flynn, read in the hearing of the bidders a notice to the effect that the premises levied and offered for sale as the property of James Flynn was not his property but that it was the property of Mrs. Margaret J. W. Flynn, by virtue of an assignment to her by him, made April 1, 1873, for a valuable consideration. The sheriff's deed to John B. Metzgar for the premises now in dispute was acknowledged in open Court on the fifteenth day of April, A. D., 1880. Under the summary proceedings authorized by the acts of Assembly, Flynn and his wife and family were dispossessed of the premises in dispute by the sheriff's vendee in October, 1880, and brought this action to recover possession.

That the premises in dispute were assessed in 1873 in the name of Mrs. Flynn, in 1874 in the name of Jas. Flynn, and in 1876, 1877, 1878, 1879 and 1880 in the names of Jas. and Jennie Flynn. That Mrs. Flynn paid the taxes for the year 1873, 1874, 1875, 1876, 1877, 1878 and 1880, but there is no evidence in the case to show from what source she derived the moneys used at paying said taxes. On April 1, 1873, there was paid to Esq. Clark, on account of the Swartz purchase money judgment note, $35.00; but by whom paid is not in evidence. On March 31, 1876, the day that Flynn got the sum of $75 out of the Dillsburg Bank on Smyser's endorsement, he paid Esq. Clark $75 on account of the Swartz purchase money judgment note.

With some hesitation the referee decides that the evidence adduced on be-

half of plaintiffs is insufficient to rebut the legal presumption that the money used to pay for the premises in dispute was the money of the husband and not that of the wife, and that that presumption remains unaffected by the plaintiff's evidence. A wife claiming real or personal property as against her husband's creditors, is held to a larger measure of proof that her money, derived from another source than her husband, paid for it, than one occupying any other relation. "Rigid proof," "clear and satisfactory evidence," "clear and full proof" and in one case "clear and unequivocal evidence," are the terms used in the decided cases to characterize the measure of proof exacted from a married woman so claiming.

Mrs. Flynn's testimony that she earned by sewing and mantua-making $300 before her marriage is unsupported by that of any other witness. Her father who was called as a witness in regard to other matters was not asked as to that. The story is inherently improbable, that a young girl only 13 years of age when she commenced work for herself could accumulate such a sum in such a way. The circumstances of the McBride family, who were in extreme poverty, compelled to borrow $14, at a period after the daughter had been engaged in this very business for several years, in order to procure the rental of a house, seems to throw great doubt on the story and especially on the allegation, that the father advanced his daughter a considerable sum of money. And her inability in her first cross-examination, to give the time of her birth, the time of her marriage, or her age when married seems to the referee to render the evidence she gave additionally doubtful, and to deprive it of that "clear and satisfactory" character required in such a case as this. The referee therefore—though with considerable hesitation—finds as a fact that the money paid by the Flynn's for the purchase of the premises in dispute was that of the husband.

The contention on behalf of the plaintiffs was:

1st. That the wife's money was used in paying for the premises in dispute, and that therefore, even without the husband's assignment there was a resulting trust for the wife as against the subsequent judgment creditors of the husband which she can enforce in this action.

2nd. That the wife's money having been used by the husband in paying for this property, his assignment to her made in April 18, 1873, was not merely voluntary but was for a valuable consideration and is good against subsequent creditors and that she is not estopped by the non-recording of her assignment.

3rd. That the assignment by her husband to her was a reasonable provision for her and is good against his subsequent creditors, and that the non-recording of her assignment does not stop her.

The first and second propositions of the plaintiffs above stated fail with the referee's decision, that the evidence is insufficient to establish the fact that the wife's money went into the purchase of the premises in dispute.

The third proposition in the referee's opinion is ruled against her by the case of Coates v. Gerlach, 8 Wright 43. The assignment by the husband to the wife directly, without the intervention of a trustee, is void at law. It will be sustained in equity, when no more than a suitable provision for her and not in fraud of his creditors, but a conveyance to the wife which denudes him of all his property is much more than a suitable provision; and it will not be sustained in equity against those who have been misled by her laches. In this case the assignment by Flynn to his wife was of all his property, and the very judgment on which the premises in dispute were sold to the defendant arose out of a false credit obtained by Flynn by reason of his apparent ownership of the premises.

The referee finds that the plaintiffs are not entitled to recover from the de-

fendant the premises in dispute, described in plaintiff's writ and that the plaintiffs pay the costs of suits.

JAMES W. LATIMER,
Referee.

To this report, exceptions were filed on behalf of the plaintiffs.

G. W. McElroy for plaintiffs.

G. W. Heiges and *W. C. Chapman* for defendant.

October 18, 1881. WICKES, A. L. J. When the learned referee determined under the evidence submitted to him, that it was the husband's money and not the wife's which paid for the property in dispute, he virtually ended this controversy.

That he arrived at that conclusion with "hesitation" or "reluctance," does not impair its effect in a case like this, when the wife is bound to establish her claim by "clear and satisfactory" evidence. To doubt seriously in such a case is to decide, and in carefully reading the evidence returned by the referee, we are not prepared to say that he committed any error in this regard.

This disposes of so much of the plaintiffs' case as proceeds upon the ground that as the wife's money was paid for the premises, it was held subject to a resulting trust in her favor, and that the husband's subsequent assignment of it to her was for a valuable consideration and hence good as against subsequent creditors. But according to the referee's report, for the plaintiffs seem to have submitted no points, the property was claimed upon the further ground, "that the assignment by her husband to her was a reasonable provision for her and is good against his subsequent creditors, and that the non-recording of her assignment does not estop her."

The referee decides this proposition against the plaintiffs upon the authority of Coates *v.* Gerlach, 8 Wright 43. But that case can no longer be cited in the broad sense in which it is here invoked

It decides "that a husband may make a gift to his wife or a settlment upon her without the intervention of a trustee, which equity will sustain, if it be no more than a reasonable provision for her, proportioned to his circumstances, and not hurtful to his creditors; but a conveyance which denudes a husband of all or the greater part of his property, is much more than a reasonable provision for a wife."

The qualification that the settlement must be a reasonable provision for the wife, and only proportioned to the circumstances of the husband, continued to be cited with approval by the Supreme Court in Townsend *v.* Maynard, 9 Wright 198, in Larkin *v.* McMullin, 13 Wright 34, in Ammon's Appeal, 13 P. F. Smith 289, and perhaps in other cases, until, what seemed to be settled law, was again carefully considered in Conley *v.* Bently, 6 Norris 47.

In the latter case, Mr. Justice Woodward traces the doctrine as employed in the decisions cited to the opinion of Mr. Justice Thompson in Hinde's Lessee *v.* Longworth, 11 Wheaton 199, and in commenting upon it, and upon Coates *v.* Garlach, the very case relied upon, the Judge delivering the opinion says, "but the vital question must always be whether creditors existing or prospective are to be endangered. The amount of the gift, or the value of the property settled, as proportioned to the donor or settler's whole estate, is an element to enter into the consideration of the design and purpose of a particular transaction. Excessiveness in amount or value would not be enough alone to create the implication of an intended fraud. In Nippe's Appeal, 25 P. F. Smith 472, when a husband made a voluntary conveyance to his wife of land subject to a lien for purchase money, it was held that the lien was not such a debt as would render the conveyance void as to subsequent creditors, and that there being no evidence of a fraudulent purpose, the fact that it was

all the property the husband owned was immaterial."

Whether it is wise or unwise to depart from the old equity rule which forms the qualification in Coates *v.* Gerlach, and kindred cases, is not a question for us to determine. It is evidently the purpose of the Supreme Court to take husband and wife out of what they call "judicial leading strings," (Harlan *v.* Maglaughlin, 9 W. N. C. 356) and without regard to the form of the settlement, to inquire only into the good faith which characterizes the transaction in its relation to the existing or subsequent creditors of the husband.

The referee has found in this case that at the time Flynn assigned the property in controversy to his wife, he was not indebted, save in an amount so small as not to be entitled to consideration, even if a subsequent creditor could take advantage of it. Nor is it shown that it was his purpose at the time the assignment was executed to hinder, delay, or defraud subsequent creditors. Nor would the fact that the wife failed to record the assignment be such *laches* on her part as would estop her from asserting her title against a judgment creditor of her husband; Morris *v.* Zeigler, 21 P. F. Smith 450; it not appearing that she *concealed* the transaction for the purpose of misleading his creditors, as was the case in Coates *v.* Gerlach. Nor would the husband's misrepresentations as to the ownership of the property operate to divest her title in favor of his creditors, if the transaction was otherwise honest and fair.

The referee's finding under the facts of this case could not be sustained upon either or all of these grounds, if the payments for the property conveyed had been completed or secured at the time the assignment was executed. Even had it been subject to a judgment for purchase money, Nippe's Appeal, *supra;* or of a mortgage, William *v.* Davis, 19 P. F. Smith 21; or if he had borrowed a portion of the purchase money at the time of the execution of the assignment; if the person from whom he borrowed the money had knowledge of the transfer, it would not affect the validity of the wife's title. But how stands this case. The deed to Flynn was executed and delivered April 1, 1872, when $100 of the purchase money was paid, leaving a balance of $400, for which he executed a note with warrant of attorney to confess judgment. Had judgment been entered upon this note, and the property conveyed subject to the lien, or the failure to enter it explained as the omission of those to whom it was given and Flynn and wife in no sense responsible for it, it is difficult to understand why, under the facts found by the referee and the authority of Nippe's Appeal, the conveyance to the wife would not stand against her husband's creditors.

But the judgment note was not offered in evidence, nor was the judgment entered upon it produced, nor was proof made that it continued to be part of the contract between the parties. I find in the notes of evidence returned by the referee that Reuben Swartz, a witness and one of the grantors in the deed to Flynn, was asked whether a "judgment offered in evidence for $400, with interest, in favor of your brother Jacob, was taken as part of the purchase money of the premises in dispute?" He replied that it was. But the referee reports that the judgment note for $400, "was not offered in evidence and no evidence was offered to show whether or not judgment was entered upon it." Nor was it pretended at the full and elaborate argument of the exceptions to this report, that there was any such judgment in existence. Surely we cannot infer or assume all that is necessary to bring this case within the ruling in Nippe's Appeal, when those who have conducted it have left us so completely in the dark, showing only that later, viz: in 1879, a mortgage was executed by Flynn and wife

for the then unpaid balance of the purchase money, which looks as if the judgment note had been abandoned by the parties to it.

As the evidence stands then, the property remains unpaid for and the future payments unsecured, when on April 1st, 1873, the husband executed the assignment to his wife.

Subsequent to that time, sums of money were paid on account of the purchase money; at one time $35, at another time $75. Taxes also were paid—sometimes by Flynn; sometimes by his wife. But where the money came from is according to the referee's report unaccounted for, and the law presumes was the husband's. Indeed, the finding of the referee before referred to, that it was the husbands money and not the wife's, which entered into this purchase, precludes all further inquiry into that fact. We have then the husband and wife occupying the property so assigned, paying for it from time to time as the money was borrowed or earned, and partly paying with the very money for which the judgment was entered, and upon which the property was sold. The fraudulent misrepresentations of the husband as to the ownership of the property, now become important—not to defeat a title good at the time it was made, but to show the fraudulent means resorted to, to complete a title which could only stand against the husband's creditors when honestly established.

Said the Supreme Court in Thompson v. Thompson, 1 Norris 380, "if the plaintiff lent his money with full knowledge that the deed had been executed to Wm. Thompson, the land in her hands could not be made liable for the debt her husband had incurred in consequence of his subsequent inability to pay. The loan was to the husband, and if the plaintiff knew he had no title, it was upon his personal credit, and not on the credit of the property. On the other hand, if the money was lent in ignorance of the true nature of the transaction and in the belief on the plaintiff's part that the deed of Wilson and his wife had been made to George Thompson, he had the right to persue the law. To permit the wife to hold it, relieved from a claim for a portion still due and unpaid of the original purchase money, which the plaintiff had advanced under a mistake in regard to the ownership, would be the sanction of a fraud."

And again in Cowley v. Bentley *supra*, p. 45, the court say, "if the fourth point was based on the theory that payments were made while the contracts were running, out of the common earnings of the husband and wife, it is difficult to see why established principles would not require that the sole ownership should be vested in the husband."

We think, therefore the referee arrived at a proper conclusion in this case, although his finding, upon the proposition discussed in this opinion, was based upon a principle which can no longer be sustained.

In regard to the summary proceedings to dispossess the plaintiffs, resorted to in this case under the act of 1836, 1 Purdon 660, we are asked to set aside the referee's report, reinstate the wife, and compel the defendant to bring his action of ejectment in the usual way. But the act provides a method by which the person in possession of the premises may retain the same until his or her alleged title is tested in ejectment. She failed to persue her remedy under the act, and we think must be treated as having waived it, at all events we have no power to reinstate her, and her application has the less merit, because of the view we have taken of the question of laws involved in the case. For the reason set forth in this opinion we dismiss the exceptions, confirm the referee's report and enter judgment thereon.

C. P. of Schuylkill County.

In re Helping Hand Marriage Association.

Charter—Marriage Associations.

A charter of a beneficial association must name its place of transacting business.

The advertisement must set forth when the charter will be presented to the Court for approval.

A charter of an intended corporation must be signed by at least five of its members.

A charter to a marriage insurance company will be refused as against public policy.

Application for a charter.

PERSHING, P. J. The signers to this application state that they have associated themselves for "the maintenance of a society for beneficial and protective purposes to its members from funds collected therein." This is one of the objects included in class first (Act of 1874, Sec. 2, P. L. 73), for which corporate powers may be granted. These beneficial and protective purposes, as set forth in the application, are "mutual assistance to both male and female persons at times when they marry, said mutual assistance is to be made by each, who holds a certificate of membership paying a certain specified sum to the one marrying.

Who may be members of, and what shall constitute the qualifications for membership in this organization, are nowhere more distinctly stated than in the above paragraph. It is a mere inference that the "male and female persons" to be assisted are first to become members of the Association. Nor does it appear in what way the "certain specified sum" is to be raised. Whatever means are employed for the purpose of raising funds the Court should be satisfied that they are such as can be legally sanctioned.

The clause designating the place of business of the proposed corporation, viz.: "In Reiner City, Pa., and in such other places as shall be determined upon by the officers," we think objectionable. The act requires that the certificate "shall set forth," *inter alia*, the name of the corporation; the place or places where its business is to be transacted; the amount of its capital stock, if any, and the number and par value of the shares into which it is divided. As we understand this, the requirements that the place of business "shall be set forth" means that they must be named. Following the names of the six persons who have formed this association is added, "No capital stock subscribed by any of the above," and this is all that throws any light on the character of this association as a stock or mutual company. In two of the papers in which this application was advertised no date is named on which it will be presented to the Court, and this we regard as an omission of some importance. On another ground however, we are compelled to refuse a charter on this application. The third section of the corporation act of 1874 provides that the charter of an intended corporation must be subscribed by five or more persons, three of whom at least must be citizens of this Commonwealth, and shall set forth, &c. It is a fatal defect in the application before us that it is subscribed by but three persons, viz.: J. A. Horn, J. M. Evans and Thomas Evans. It was decided in Rhoads *v.* The Hoernerstown B. & S. Association, 1 Norris, 180 that a charter granted by the Court of Common Pleas, on a petition signed by a less number of persons than required by the statute, conferred no corporate powers.

I would not however grant this charter if all the foregoing objections were removed out of the way. By the terms of the statute all applications for incorporation must be presented to a law judge, who is required to peruse and examine the instrument, and if, among other things, it "shall appear to be lawful and not injurious to the community" he shall approve the charter. Now, at the time when the Legislature authorized corporate powers to be granted for the "maintenance of a society for beneficial or protective purposes to its members from funds collected therein," these marriage insurance companies had no existence,

and it did not enter into the mind of any one that such organizations would ever arise and claim the right to operate under this clause of the statute. Anything which induces parties to enter into the marriage relation through mercenary considerations strikes at the very foundation of human society and is necessarily injurious to the community. The very large number of divorces annually granted by the Courts of the several states, has justly excited the alarm of thinking men of all classes. It does not require the ken of a prophet to foresee that the granting of corporate rights to associations for the purpose set forth in this application will largely increase the divorce business of the Courts, and thus swell to a flood the stream of demoralization in this particular which already exists. On this question I am glad to range myself with those judges who have refused to grant charters to these so-called marriage associations. I concur with Judge Henderson when he declares that the contract for marriage is degraded when any other consideration enters into it than that of mutual love and affection; that neither the wants of the community, the good of society, or the welfare of the individual requires the incorporation of marriage insurance companies. The application for charter is refused.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Criminal law—Sunday—Master and Servant.—The owner of a store who permits his clerk to sell for him on the Lord's day, commonly called Sunday, as well as the clerk, is liable to the penalty imposed by the Act of Assembly of April 22, 1794, and its supplements.—*Seaman v. Com.*, 12 Pittsburgh Legal Journal 95.

Interest Coupon—Nature of.—An interest coupon detached from the bond on which it was issued is but an incident and part of the bond itself.

It is analogous to a promissory note, not to a check or bill of exchange.

There is no obligation on the holder to present it for payment at once on its maturity.

The banking house at which it is made payable is the agent of its maker, and the holder cannot lose by the insolvency of such bank.—*Williamsport Gas Co., v. Pinkerton,* 1 Chester County Reports 231.

Judgment—Assignment as collateral—Surety.—A assigned to B a judgment, held by him against D, as collateral security for a debt due to B by C upon an agreement in writing. Subsequently C, having failed to pay the debt according to the terms of his agreement, entered into a second agreement with B under which he executed a mortgage to B for the larger part of the debt. D, having made an assignment for the benefit of creditors, settled with A by giving him another judgment which was to be void if B's claim to the first judgment was held to be still good. Upon a *sci. fa.* by B to continue the lien of the first judgment, HELD, 1st, That as the original debt was found by the jury to be included in the mortgage given under the subsequent agreement, A was entitled to a return of his judgment, and the verdict was properly for the defendant. 2nd, That B, knowing A to be the mere surety of C, by extending C's time discharged the surety.—*Balfour v. Brown,* (Delaware C. P.) 1 Delaware County Reports 129.

Personal property—Delivery of possession—Parent and child.—A father sold his daughter a mare. They resided together on his farm, and there was no apparent change of ownership in the animal. HELD, that the unity of residence made requisite a more notorious delivery, and the offspring of the mare could be levied on under an execution against the father. It is not error under such circumstances for the court to take the case from the jury.—*Crowley v. Irvin.* 12 Pittsburgh Legal Journal 94.

YORK LEGAL RECORD.

VOL. II. THURSDAY, NOV. 17, 1881. No. 37.

ORPHANS' COURT.

Brougher's Estate.

Will—Construction of—Life Estate—"What is left."

A testator directed that his children were "to have share and share alike v. e. equally." Afterwards he provided that "all of what is left of Mary A. Brougher's legacy now inter-married with George Mummert, after her death to fall back to said Mary A. Brougher's brothers and sisters, or their heirs." HELD, that Mary took a fee simple, and not merely a life estate.

Exceptions to Auditor's report.

The report of the auditor, Horace Keesey, relating to the question involved in this case, is as follows:

The testator in his will bequeaths all his estate, after the payment of his debts and funeral expenses as follows, to wit:

Third—All my children to have share and share alike v. e. equally, except $100, shall be deducted from the legacy of Elizabeth Brougher, intermarried with Absalom Rentzel, and given to my granddaughter Henrietta Rentzel, daughter of Sarah Brougher, who was intermarried with Henry Rentzel, but is now intermarried with Michael Hoffman.—(Said Henrietta Rentzel who was of late intermarried with Amos Chronister).

Fourth—All of what is left of Mary A. Brougher's legacy now intermarried with George Mummert, after her death to fall back to said Mary A. Brougher's brothers and sisters or their heirs.

Your auditor, therefore, in accordance with said sections, has deducted $100.00 from the share of Elizabeth Rentzel and awarded it to Henrietta Rentzel, now Chronister and awarded the share of Mary A. Mummert, to her, upon giving such bond as the Orphans' Court of York county may direct.

To this report the following exception was filed:

The auditor erred in awarding to Mary A. Mummert, her share out of testator's estate of $861.81 1-3, only upon her giving bond as the Orphans' Court may direct, and in not awarding said sum to her absolutely and unconditionally.

E. W. Spangler for exceptions.

October 18, 1881. WICKES, A. L. J. The testator provided that all his children should have "share and share alike, v. e. equally," but subsequently, in the fourth clause of the will, he provides that "all of what is left of Mary A. Brougher's legacy, (she being one of his children) now intermarried with George Mummert, after her death to fall back to said Mary A. Brougher's brothers and sisters or their heirs."

The auditor awarded to Mary A. Mummert her share "upon her giving such bond as the Orphans' Court may direct."

The language of the testator evidently contemplates that his daughter shall have the right to use the whole or any part of the bequest to her during her life, as it is only "what is left," that is to "fall back." Such language has always been held to create an absolute interest and not a life estate; 1 Jarman on Wills 653; Pennock's Estate, 8 Harris 268; Cox *v.* Roger, 27 P. F. Smith 160; Church *v.* Distrow, 2 P. F. Smith 219.

The auditor erred in supposing that only a life estate was given the exceptant; he should have awarded it to her absolutely.

With this modification we confirm the report.

COMMON PLEAS.

C. P. of Lackawanna County.

Evans v. Ives.

Arbitrators—Married or single woman may be.

Plaintiff entered his rule to arbitrate. Upon the day fixed for choosing arbitrators the defendant failed to appear, although notice had been served upon him as the law required; whereupon the prothonotary fixed the number of arbitrators at three, and named a single woman as one.—After the service of the second rule, two of the arbitrators met, but the female arbitrator failed to appear; whereupon the arbitrators appointed a married woman in her place. The case then proceeded to an award in favor of the plaintiff: whereupon the defendant moved to set aside the

award, because of the appointment of a married or single woman as arbitrator. HELD, that there is nothing in the Act of 1836 which prevents a married or single woman from being an arbitrator; and that such appointment is not sufficient ground for setting aside the award.

Rule to set aside award of arbitrators.

HANDLEY. P. J. The novel and very interesting question raised by this rule was submitted for our opinion during the last sitting of the court. From the facts agreed upon, it seems that the plaintiff entered his rule to arbitrate, and served the same upon the defendant, who failed to appear at the time and place fixed for choosing the arbitrators; whereupon, in pursuance of the fourteenth section of the act of 1836, three arbitrators were duly appointed. One of the arbitrators thus appointed was a single gentlewoman by the name of Mary Howell. At the meeting of the arbitrators Miss Howell failed to appear, but thereafter proceedings were had as follows, viz:

"Now, July 1st, 1881, John Runk and E. C. Newcomb, two of the arbitrators named, met at the time and place mentioned in the rule. Plaintiff appears by counsel; defendant in default. Due proof of service of the rule on Mary Howell, the absent arbitrator, having been made, the arbitrators present duly appointed Mrs. Alice M. Winton arbitrator to act in the place and stead of Miss Mary Howell, the absent arbitrator; and the arbitrators having been duly sworn, due proof of the service of this rule on the defendant by his acceptance hereon being made, after hearing plaintiff's proofs and allegations, do award in favor of the plaintiff," etc.

It was therefore agreed that if the court be of the opinion that in the absence of the defendant a woman could legally be appointed as an arbitrator, and upon her non-appearance at the meeting of the other two arbitrators, her place could be supplied by the appointment of a married woman as arbitrator, then the rule to be discharged; otherwise to be made absolute.

Counsel for the plaintiff contends that nowhere in the act of 1836 does it appear that men shall be appointed arbitrators, and hence a woman may be an arbitrator. He also contends that the prothonotary, in the absence of one of the parties at the time fixed for choosing arbitrators, is only required to nominate a suitable and disinterested person. In this connection he cites the cases of Withers *v.* Haines, 2 Barr 437, and Steel *v.* Herrington, 1 Grant 442, to show that the prothonotary, while acting under his oath of office, is presumed to have performed his duty according to law. He further contends that the defendant does not allege that the female arbitrator was "unsuitable," or "interested;" nor is there any allegation of "misbehavior," or "corruption," or of "undue influence," in procuring the award.

From all this it can be seen that counsel for the plaintiff rests his case upon the construction to be placed upon the act of 1836.

Counsel for the rule failed to present any brief, and hence the burden was placed upon our shoulders to ascertain whether a gentlewoman, married or single, may or may not be appointed an arbitrator.

Proceedings before arbitrators we find to be a part of the common law of England for many centuries. In Fitzherbert's Abridgment, page 43, edition of 1577, we find this subject discussed. The first act of Parliament we find on the question of submitting cases to arbitrators is William III, chapter 15, which went into force on the 11th day of May, 1698. In this statute it is provided that controversies may be submitted to "any person or persons" as arbitrators; 3 Evans' Statutes 360.

We have no hesitation in saying that the framers of the act of 1836 used the word "person" in that statute the same as it was used in the statute of William. If we are correct here, then our road is clear in this matter. The reading on this statute is, that neither natural or legal disabilities hinder any one from being an arbitrator; 1 Read. St. 103.

Lord Bacon says that arbitrators are persons indifferently chosen to determine the matter in controversy, and then adds: "that infants, persons excommunicated, outlawed, etc., may be arbitrators, for every person must use his own discretion in the choice of his judges." 1 Bacon's Abr. 317; 5 Viner's Abr. 41.

In the case of Matthew *v.* Ollerton, 4 Mod. 226, a man took a horse from a bishop. The archbishop brought his action, and the defendant agreed to submit the same to the bishop as arbitrator. The bishop decided in his own favor; whereupon the defendant moved to set aside the award, because the bishop was interested in the case; but Lord Hale refused, after argument, for the reason that the defendant had selected his judge to decide his case.

The defendant in that case evidently overlooked the fact that the bishops of modern times make wills, while the apostles did not. Had the defendant given this subject the least thought, he certainly would not have made the plaintiff in the case sole arbitrator to decide his case.

The Roman law expressly provided that if a man be constituted arbitrator in a dispute to which he is a party, he cannot pronounce an award; Kyd's award 71.

The Roman law in this respect corresponds with the fifth paragraph of the fortieth section of the act of 1836; but the first paragraph of the same section is in strict accordance with the decisions at common law. In the first paragraph of the fortieth section it is expressly provided that the parties may select any one person whom they shall concur in choosing; 1 Purd. Dig. 82, § 40.

In West's Symboliography, 163, it is said that a married woman cannot be arbitrator. This, however, is the rule of the civil law. Justinian says that it is contrary to the proper character of the sex to allow women to intermeddle with the office of judge; Kyd's award, 71; Wood's Civil Law, 327. In Kyd on Awards, 70-1, it is said that an unmarried woman may be an arbitrator. To sustain this, the author cites the Duchess of Suffolk Case, 8 E. 41; 1 Br. 37. In 2 Peterdorf's Abr. 129, it is said that it is no objection to an award that the arbitrator is a married woman.

Gentlewomen have also held and exercised judicial authority. Annie Countess of Pembroke, held the office of sheriff of Westmoreland, and exercised the duties thereof in person. At the assizes of Appelby, she sat with the judges on the bench. Hargr. Co. Lit. 326; 8 Bac. Abr. 661. Her right to sit upon the bench, as a judge, will be fully understood when it is borne in mind the sheriffs, at that time, held court and exercised judicial power. Sheriffs had power to inquire of all capital offences and issue process and enforce the same. But this power was afterwards restrained. By Magna Charta, chapter 17, it was enacted "That no sheriff shall hold pleas of the crown;" 8 Bacon's Abr. 688.

Eleanor was appointed Lord Keeper of England. It would seem from the history of this noble woman, that she actually performed the duties of Lord Chancellor in person. It is said of her that in the summer of 1235, King Henry appointed her lady Keeper of the great seal. She accordingly held the office nearly a whole year, performing all the duties, as well judicial as ministerial; she sat as judge in the *Aula Regea*. These sittings were, however, interrupted by the *accouchment* of the Judge when she was delivered of a daughter. After retiring from the bench, and the appointment of her successor, she was delivered of a boy, who afterwards became Edward I of England; 1 Campbell, L. L. Ch. 134-7. Without referring in any manner to Eve, the first arbitrator appointed in this world to decide the controversy about eating the forbidden fruit, or to the manner Deborah judged Israel, we are clearly of the opinion that under the act of 1836, a woman, married or single, may

be appointed arbitrator, and may act as such, and make a valid award.

Rule discharged.

C. P. of Chester County.

Smith v. Morrison.

Sheriff—Fees of—Poundage.

The sheriff is not entitled to poundage where the execution is staid.

Amicable action in which James Y. Smith was plaintiff, and Wm. B. Morrison, sheriff of Chester county, was defendant, to determine the legality of certain costs and charges claimed by the said defendant in his official capacity as sheriff, in the execution of a certain writ of *Levari Facias* sur Mortgage. The decision of the case was submitted to the court without the aid of a jury. The facts appear sufficiently in the opinion of the court.

BUTLER, P. J. We find the following facts:

Judgment having been obtained against the plaintiff on a mortgage held by Gheen & Morgan, an execution was issued and placed in the defendant's hands, as sheriff, and the property adver tised for sale. Afterwards the plaintiff induced Pyle & Brown to purchase the mortgage ,take a transfer and have the execution staid. To accomplish this, it became necessary to pay costs, and when the plaintiff, through his agent, Mr. Pyle, offered to do so, the defendant included in his bill, $34.28 "poundage," and insisted on its payment. Unable to complete the arrangement for transfer and stay execution without, the plaintiff paid the $34.28 under protest.

It seems clear that the sheriff was in error. He was not entitled to poundage. —The debt was not paid,—the judgment was not collected. Nothing was realized on the execution. It drove the plaintiff to find a purchaser for the mortgage, nothing more. If the money had been realized on it, the lien of the mortgage would be gone. If "poundage" may be collected under these circumstances, the plaintiff may have it to pay several times on this debt. For the services actually rendered,—executing the writ, copies, mileage, advertising, hand bills, &c.,—he was entitled to be paid; the fee bill fully provides for them. But the services for which "poundage" is provided—recovering and paying over money in satisfaction of process were not rendered and could not be charged for.

Judgment must be entered for the plaintiff for $34.28, with costs of suit.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Judgment against a minor—Appeal.—When judgment is entered against a minor, and there is nothing upon the record to show this fact, an appeal and not a certiorari is the proper remedy.—*Miller v. McGrath,* (Schuylkill C. P.) 1 Schuylkill Legal Record 94.*

Judgment — Lien of — Possession of premises. — Where a town lot, upon which there are no buildings and which is not enclosed by a fence, is tilled and cultivated as a truck patch for the raising of vegetables, and the like, by a purchaser whose deed is not recorded, such occupancy and use does not constitute the actual possession contemplated by the act of assembly of April 16, 1849, in regard to the lien of judgments.—*Windle v. Brown,* (Chester C. P.) 1 Chester Co. Reports 294.

Will—Duty of executor to defend—Costs.—The executor is not bound at all hazards to defend the will of his testator but he must support it, if at all, as the agent and in the interest of those who are to be benefitted by his action.—*Whitaker's Estate,* (Philadelphia O. C.) 38 Legal Intelligencer 412.

*See, however, Hoff v. Hoke et al., 1 YORK LEGAL RECORD 207, in which, four weeks after the rendition of the judgment, a *certiorari* was allowed and execution set aside, because of the infancy of two of the defendants.

YORK LEGAL RECORD.

VOL. II. THURSDAY, NOV. 24. 1881. No. 38.

COMMON PLEAS.

Shrewsbury Savings Institution v. Seitz.

Execution—Setting aside—Promise not to issue execution.

The defendant in the execution applied to the Court to set aside the execution because of an alleged promise made by the plaintiff to the defendant at the time the judgment bond was signed upon which the judgment was entered, that execution would not issue until the settlement of the assigned estate of a third party. In support of this application, he and his son testified that this promise was made by one of the directors, once at the bank, in the presence of A., and again at the defendant's house, in the presence of B. This promise was denied by the director referred to and by A. and B., the alleged witnesses thereto. The bond contained the words "without stay of execution," and execution was issue before the time mentioned. HELD, that there was not such "precise and indubitable proof" as is necessary to set aside the terms of the bond.

Rule to set aside execution, &c.

W. C. Chapman for rule.

Jas. W. Latimer, contra.

WICKES, A. L. J. We are asked to set aside the execution in this case, because of an alleged promise, made by the plaintiff to the defendant at the time the judgment bond was signed, upon which the judgment was entered, that execution would not issue until the settlement of the assigned estate of Jacob S. Seitz.

The bond itself is drawn "without stay of execution," and the rule of law requires very clear and precise evidence, that such a promise was made as an inducement to sign the instrument, before such an application can be entertained.—The authorities say that after such a promise is made, the attempt afterward to take advantage of the omission of it from the contract, is a fraud upon the party who was induced to execute it upon such promise. But the cases are full to the point, that the evidence to establish such fraud, must be "clear, precise and indubitable" and the importance of the rule requiring such proof, is asserted with greater emphasis, since parties are allowed to testify in their own behalf: Shepler *v.* Scott, 4 Norris 329; Penna. R. R. Co. *v.* Shay, 1 Norris 198.

Let us apply these principles of law to the case before us. The defendant and his son Henry Seitz, are the only witnesses who testify to the alleged promise, and they fix the times when it was made at the Savings Institution, in the presence of the directors, and afterwards when the judgment bond was executed. They alleged that Mr. Kolter, one of the directors made the promise on behalf of the Institution on both occasions, and Henry Seitz testifies that Dr. James Gerry was present when the interview at the bank took place, and both agree that Mr. A. G. Collins was present at the house of defendant when the promise was repeated, and when the instrument was signed. Christof Kolter, denies that he used the words imputed to him, or made any promise whatever as to the time execution should or would issue against this defendant. Dr. Gerry has testified that he was never present at an interview between the defendant and the officers of the bank, when such a promise was made and A. G. Collins verifies the statement of Mr. Kolter, as to what occurred at the time the judgment bond was signed at the defendant's house. Certainly, this conflicting evidence does not rise to the character of proof necessary to establish such a fraud as will overthrow the express terms of a written contract. I cannot even say the *preponderance* of evidence is in that direction—but I am very clear that it falls far short of the "precise and indubitable" proof required by the law.

In Graver *v.* Scott, 30 P. F. S. 88, a case cited by defendant's counsel on the argument of this motion, the question was not as to the sufficiency of the evidence, but whether a verbal promise at the making of a written contract, if made to secure its execution, may be given in evidence at all. It was held admissible because as before said, it would be a fraud to take advantage of its omission from the contract, but there is not one word in the case, which affects for a moment, the rule of law defining the meas-

ure of proof necessary to establish the inducement held out at the time of the making of the contract.

Rule discharged.

Mayer v. Spangler.

Sheriff's sale—When set aside—Inadequacy of price—Sufficiency of notice.

The defendant in the execution made application to the Court to have the Sheriff's sale of his real estate set aside, on the ground that no notice of the sale was served on or given to him. HELD, that such notice must be proved by the Sheriff, and he having failed to do so, the sale must be set aside.

While great inadequacy of price is not of itself sufficient cause for setting aside a Sheriff's sale, yet, when coupled with the fact that the bidding was actually going on at the time the property was struck off, and that there was an outstanding bid of twenty-five cents more per acre which it is supposed the Sheriff did not hear, the Court would be compelled to set aside the sale.

Rule to set aside Sheriff's sale.

Blackford & Stewart for plaintiff.

V. K. Keesey for other judgment creditors.

Geo. W. McElroy for purchaser.

WICKES, A. L. J. This is an application to the Court to set aside the Sheriff's sale of the defendant's real estate.

The reasons pressed on the argument are:

1st. That no notice of said sale was served on or given to defendant as required by law.

2nd. Gross inadequacy of price.

3rd. That the property was not struck off to the highest bidder.

The act of June 16, 1836, Pudr. Dig. 650, pl. 76, requires that the notice of the time and place of sale, and of what lands or tenements are to be sold, shall be given defendant. This is almost a literal transcript of the act of 1705, which so far as it related to notice to defendant, received a construction by the Court, as far back as 1811, which has not been departed from, we believe, in any subsequent case.

In Passmore *v.* Gordon, 1 P. A. Browne 320, it was admitted that no written or printed notice had been served on the defendant, but it was proved that the Sheriff's deputy had mentioned the intended sale to the defendant. The Court held that "the notice must be proved by the sheriff, but that it need not be written or printed."

True, the presumption is that the Sheriff did all the law required him to do, but in the case before us, the sheriff proves no notice to the defendant either verbal or written, notwithstanding the defendant in his application to the Court had made oath that no notice was served on or given to him.*

We need not, perhaps, examine the other grounds upon which our interference is asked, but it may be as well to say that while the great inadequacy of price in this case would not of itself cause us to move, yet coupled with the other fact that the bidding was actually going on at the time the property was struck off, and there was an outstanding bid of 25 cents more per acre, which it is supposed the sheriff did not hear, but of which no proof has been made, would independently of the first reason assigned, compel us to grant the relief prayed for. We think the interests of debtor and creditor alike require it.

Rule to show cause why sheriff's' sale made in obedience to a writ of *venditioni exponas* should not be set aside, made absolute.

Renoll v. Dubs.

Bond — Assignment of — Equities between the parties.

Although it is a plain rule of law, that a party in interest cannot testify as to matters occurring in the lifetime of the assignor of the thing or contract in action, who is since dead, yet where there is other evidence which shows the relations between the original parties to the transaction to be inquired into, and from which the equitable defence arises, the mere admission of such improper evidence will not prevent the Court from considering such evidence as is proper and legal.

Rule to open judgment, &c.

W. C. Chapman for rule.

S. H. Forry, contra.

September 19, 1881. WICKES, A. L. J. That the assignee of a bond takes it subject to all the equities of the obligor against the obligee, unless he first inquire of the obligor whether he has any de-

*See also, as to sufficiency of notice to the defendant Fitzsimmons *v.* Fitzsimmons, *ante* 121.

fence or set off against it and receive an answer in the negative, is too well understood to need the citation of authorities to sustain it.—Indeed the principle of law was not questioned on the argument, but it was said that no legal evidence was produced to show that such equities existed. It is certainly true that this application is supported, in a measure, by evidence taken in the most flagrant disregard of the plain rule of law which prohibits a party in interest to testify as to matters occurring in the lifetime of the assignor of the thing or contract in action, who is since dead, which evidence was constantly and properly objected to, but was simply *forced* upon the commissioner. But apart from this mere makeweight in the case, there is other evidence which shows the relations between the original parties to the transaction to be inquired into, and from which the equitable defence arises. Of its sufficiency we ought not perhaps to judge, we think it ought to be heard and determined by a jury.

And now to wit, September 19, 1881. Rule absolute.

C. P. of Dauphin Co.

In the matter of the Application for a Charter by the Mutual Aid Association of North America for Unmarried Persons.

Charter—Marriage Association.

The Courts will not grant a Charter for a Marriage Association.

September, 1881. HENDERSON, J. This is an application for a charter of incorporation of a mutual aid association of unmarried persons under the provisions of the Act of 29th of April, 1874, by the name of the "Mutual Aid Association of North America for Unmarried Persons." The avowed object of the association is to issue certificates of membership in certain specified amounts, and to pay parties for whose benefit the certificates are made from a fund to be raised in each case of marriage by an assessment of the members. It has no capital stock. Due proof has been made of the publication of the notice of this application; and it is now our duty to peruse and examine it, and if in proper form, and within the purposes named in the first class specified, and shall appear lawful and not injurious to the community, to approve of the same.

By the act referred to corporations are divided into two classes. Corporations "not for profit" and "corporations for profit." A law judge is authorized to grant charters to corporations of the first class. These are again designated or described according to the purpose or object of the society. We find, among others, that the ninth clause of the third paragraph of section 2 of said Act provides that corporations may be formed for "the maintenance of a society for beneficial or protective purposes to its members from funds collected therein." We propose to inquire:

1. Is the purpose of this society beneficial or protective to its members? The object is distinctly announced. The machinery may or may not be expensive. If it is—whilst it may be a source of profit to the officers—at least compensatory—it may become a burden to the members, and thus prevent the purpose of the organization, and defeat the true intent and meaning of the law. If we group together the different kinds of "corporations not for profit," we find that one general expression of equality of participation, or of benevolent or philanthropic design, pervades them all. It is true, as argued, that if these associations are run in the interest of a few officers, whose salaries and commissions depend upon assessments upon the members, this is an *abuse* of the privilege granted, and ought not to influence the judgment against the "purpose" of the association. We do not therefore anticipate any such result. We incline rather to the opinion that the principles of these associations is foreign to any beneficent purpose and if worked out to a practical result we fail to discover any beneficial or protective feature. Beneficial associations had their

origin in the benevolent purpose of giving assistance or protection to persons in cases of want, of sickness, of suffering, or of misfortune—to those who require it, and to those who are unable to help themselves, and in cases of death to provide for funeral expenses. Such is not the design here. It may be purely speculative. The certificate of membership promises to the holder a specified amount upon marriage, without reference to the wants or necessities of the member, neither marked nor qualified by any benevolent, charitable or protective purpose. Beneficial and protective associations are clearly defined in their operations, and are well known to the professional men and understood by the lay men. Unless a "marriage association" comes within the class of beneficial or protective associations we are without power in the premises. The language of the 9th clause of section 2 of said Act is very general, it is true, but for this reason we should closely scan the specific purpose of the association if it comes within the purview of the Act. We cannot find that the charter asked for comes "within the purpose named in the first class," specified in said Act, and therefore we have not the power to grant it.

2. We are constrained by another consideration to withhold our approval of this charter. By the third section of the Act it is made the duty of the judge to peruse the charter, and if it is found to be lawful, and *"not injurious to the community,"* to approve the same. We have given the purpose and design of these associations, and those of a similar character, our serious consideration, and especially those out of which speculative life insurance has arisen, which is near akin to the moving principle of "marriage associations"—in the one case the holder of the certificate realizes upon his investment or risk at the death of the subject, in the other at the time of marriage. There is temptation here—there may be a victim in either case. We are not satisfied that these associations are not injurious to the community. They are not calculated to inspire confidence in the marriage relation. Its purity is the rock bed of society. Neither the welfare of the State or the community demand any such benefit or encouragement as is here sought to be given to the individual. It does not add to but takes away from the sanctity of an holy ordinance. As a civil contract the highest consideration should be mutual love and affection. It is degraded by any other, and the idea of mutual benefit and protection in the mode prescribed by certificates of membership and assessments upon the members is, in our opinion, altogether chimerical—no practical or beneficial result can flow from it. A premium upon marriage may be the price of virtue. Neither the wants of the community, the good of society, or the welfare of the individual, require any such organizations.—On the contrary, we believe that in the end they will prove subversive of virtue and good morals.

The application is not approved.

[See In re Helping Hand Marriage Association, *ante* 147.]

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Administrator—Purchaser at his own sale—When sale will be set aside.—A sale by an administrator, indirectly to himself, will be set aside after a lapse of even three years, on the application of any one creditor, and the fact that the creditor may have brought suit on the administration bond will not prevent the relief.—*Worth's Estate,* (Chester O. C.) 1 Chester County Reports 297.

Practice—Substitution of administrator.—An administrator of a deceased defendant cannot be brought upon the record by a suggestion of the plaintiff's counsel.—*Hanse v. Pollock and Medler,* (Schuylkill C. P.) 2 Schuyl. Leg. Rec. 181.

YORK LEGAL RECORD.

VOL. II. THURSDAY, DEC. 1, 1881. No. 39.

SUPREME COURT.

Stone and Wall v. McMullen.

Wills—Words "die without legitimate issue"—When construed to contemplate an indefinite failure of issue.

The clause of a will read as follows. "I give and devise to my two sons Hugh McMullen and George McMullen the plantation that I now live on to be equally divided between them to them their heirs and assign, for ever. Subject to the payment of thirty shillings yearly to my daughter Elizabeth, during her natural life and one-third of the clear rent, yearly to my dearly beloved wife during her natural life. It is also my will that if either of my two sons, Hugh or George *should die without legitimate issue that the survivor shall inherit the whole of the deceased's part of the land aforesaid* * * * * It is further my will that my said two sons shall neither rent, bargain nor sell the land aforesaid, nor enter into agreements, indentures or bargains of importance before they arrive to the age of twenty-one years but by the approbation and consent of my executors." HELD, that the terms of the will must be construed to contemplate an indefinite failure of issue, that therefore a fee tail was vested in the devisees with cross remainders over, and the plaintiff was accordingly entitled to recover.

Such a construction will give way only when the will contains other expressions, showing an unequivocal intent on the part of the testator that his words shall not be construed in their technical sense.

Error to the Common Pleas of York County.

Ejectment, by George McMullen against Thomas H. Stone and Jacob Wall, for an undivided interest in a tract of land in York county. The material facts are given in the opinion of the Court below, McMullen *v.* Stone and Wall, *ante* 21.

The Court entered judgment for the plaintiff for the one undivided tenth part of said land. The defendants took this writ, assigned for error the said judgment.

R. L. Muench and *V. K. Keesey*, for the plaintiffs in error.

The testator first devises the land to his two sons, naming them, their *heirs and assigns*. By failure of issue, in the next sentence, he meant a definite failure either in the testator's lifetime, or at the death of the first taker. "If *either* of my two sons Hugh or George should die without legitimate issue, the *survivors* shall inherit (from testator) the whole," etc., may fairly be read: "If my son Hugh shall die without children then George shall take, and if George die without children then Hugh shall take the whole of the *deceascd's* part." He says "survivor" of "either of his two sons Hugh or George," not "the survivor, his heirs," &c. The testator's belief that he had given his sons a fee simple is indicated by the restriction at the end of the devising clause that they shall not *sell* (in fee) during their minority *except* with the approval of his executors. The testator was aged and unlearned, but he has expressed the fact that he did not intend an indefinite failure of issue, with sufficient clearness to exclude a rule of construction only applicable where the will contains technical words without more. The will is to be read as you would a letter of the testator;

2 Jar. on Wills, 268, 373.
Hill *v.* Hill, 24 Sm. 173.
Taylor *v.* Taylor, 13 Sm. 481.
Ingersoll's App., 5 Nor. 240.
Reck's App., 28 Sm. 432.
Wright's App., 8 Nor. 67.
Diehl *v.* King, 6 S. & R. 32.
Eichelberger *v.* Barnetz, 17 S. & R. 295.
Anderson *v.* Jackson, 16 Johns. 32.

W. C. Chapman for defendant in error.

The settled construction to be given to the words, "die without legitimate issue," is not overcome by the use of the word "survivor;"

Clark *v.* Baker, 3 S. & R. 470.
Haines *v.* Witmer, 2 Yeates, 400.

"Survivor" means "the one who *personally or in his issue* is the survivor;"

Clark *v.* Baker, supra.
Roe *v.* Scott, 1 Fearne on Rem. 47, note.

Nor does the subsequent restrictive clause affect this construction in any way except by different punctuation. In the will it is not punctuated at all.

October 3, 1881. STERRETT, J. The will of Hugh McMullen, the elder, admitted to probate in March, 1793, contains the following provisions, upon the construction of which the present contention hinges, viz.: "I give and devise to my two sons, Hugh and George McMullen, the plantation that I now live on, to be equally divided between them, to them their heirs and assigns forever.

Subject to the payment of thirty shillings yearly to my daughter Elizabeth during her natural life, and one-third of the clear yearly rent to my beloved wife during her natural life. It is also my will that if either of my two sons, Hugh or George, should die without legitimate issue, that the survivor shall inherit the whole of the deceased's part of the land aforesaid. . . . Further, it is my will that my said two sons shall neither rent, bargain, nor sell the land aforesaid, nor enter into agreements, indentures, or bargains of importance before they arrive at the age of twenty-one years, but by the approbation and consent of my executors." These are the only clauses in the will that can have any bearing on the question presented for our consideration. The testator left six children, of whom Hugh and George, then respectively sixteen and twelve years of age, were the youngest. They took possession of the farm devised to them by their father, and shortly afterwards divided the same between them. Hugh died testate in 1856, leaving two daughters, Elizabeth and Mary Ann, to whom he devised his portion of the land. In February, 1879, Mary Ann died intestate, and without issue. A few days thereafter, Elizabeth, who had survived her husband, conveyed part of the land to Stone, one of the defendants below, and another part to Wall, the other defendant; and, in October of the same year, she died without issue. The issue of Hugh thus became extinct. George, the other devisee, died in December, 1850, leaving five children, all of whom have died since, leaving children, of whom the plaintiff below is one. During his life time, in 1819, George sold his part of the estate; and the plaintiff sought to recover in this action not only that portion of the land devised to Hugh, but also that which George sold during his lifetime, and which by sundry conveyances had, in the meantime, passed to the defendants below. Inasmuch, however, as the purchasers from George, and those claiming under them, have been in continuous adverse possession since 1819, and as the right of action accrued in 1850, it was properly conceded that there could be no recovery as to that part of the land. But, the Statute of Limitations has no application to Hugh's portion, and the only question that arises in regard to it is: What estate did he take under his father's will—an estate in fee simple or fee tail? This depends solely on whether the devise over was upon a definite or an indefinite failure of issue. If it was the latter, the devisee clearly took only an estate tail, as the Court held, and in that event the judgment is right. In the first clause, above quoted from the will, the testator devised his plantation to his two sons, "their heirs and assigns forever." Standing alone, the language thus employed would undoubtedly give them a fee simple; but it is well settled that a testator may restrain the generality of a devise by subsequent expressions, and convert that which otherwise would have been a fee simple into an inferior interest; and in this mode more frequently than in any other is a particular estate given (Middleswath's Admr. *v.* Blackmore, 24 P. F. Smith 414.) The generality of the devise was so restricted in this case. In its legal signification the word "issue" very nearly resembles the technical phrase "heirs of the body," and it is well settled that when real estate is devised, by one or more limitations in the same will, to a person and his issue, the word "issue" will be construed as a word of limitation, so as to give the ancestor an estate tail, unless there are expressions in the will unequivocally indicative of a contrary intent. Such expressions as "if he die without issue," "on failure of issue," "for want of issue," "without leaving issue," and the like have frequently been considered; and when standing alone in a will, the

law defines them and gives them a precise and certain signification. They import an indefinite failure of issue, and thus create an estate tail in the first taker. The technical meaning given to such phrases has long since become a settled rule of property from which it would be unsafe to depart, except in cases that come clearly within a recognized exception to the rule. The following are a few of the many cases in which the subject has been considered; Clark *v.* Baker, 3 S. & R. 470; Eichelberger *v.* Barnetz, 9 Watts 447; Langley *v.* Heald, 7 W. & S. 96; Eby *v.* Eby, 5 Barr 463; Angle *v.* Brosius, 7 Wright 187; Kleppner *v.* Laverty, 20 P. F. Smith 70. According to these and other authorities that might be cited, the language employed by the testator "if either of my two sons Hugh or George, should die without legitimate issue" must be taken to mean an indefinite failure of issue; from which it follows that the devisees took an estate tail.

But, while the rule of law which thus fixes the meaning of certain forms of expressions is in a certain sense, an unbending one, it is not without some exceptions. It is conceded, as already intimated, that the construction referred to will give way when the will contains other expressions which clearly indicate that the technical words were intended to have a different meaning. The cases, however, show that the intent not to use the words in their legal sense must be unequivocal, and so plain that no one can misunderstand it; Angle *v.* Brosius, *supra;* Guthrie's Appeal, 1 Wright 9; Physic's Appeal, 14 Wright 128. In an early English case we have an instance in which the legal sense was controlled by plain and unequivocal words. The testator died leaving issue three sons, William, Thomas and Richard. He devised land to Thomas subject to the payment of twenty pounds to Richard at the age of twenty-one years, and then provided that if Thomas died "without issue, living William, his brother," the latter should have the lands in fee. The question was, whether Thomas took an estate in fee or fee tail, and it was held that the clause, "without issue, living William," did not mean an indefinite failure, but a dying in the lifetime of William without issue.

It is claimed by the plaintiffs in error that the death of whichever of the two sons might happen to die first, was the period fixed by the testator when the failure of issue was to occur, and that this definite failure of issue is indicated by the concluding words of the devising clause, "the survivor shall inherit," etc. In support of this view, Anderson *v.* Jackson, 16 Johns. 382 is cited. In that case there was a devise in fee to two sons, with a subsequent direction that "if either of the said sons should depart this life without lawful issue, his share or part should go to the survivor;" and it was held that the words of the devise created a defeasible fee in the first taker with a limitation over by way of executory devise. But that case is contrary to the general current of authority, both in England and here; and the same may be said of Johnson *v.* Currin, 10 Barr 498, and other cases that are supposed to recognize the same doctrine. All the cases in which the question has been considered, with very few exceptions, are opposed to giving any such effect to the word "survivor" as is claimed for it by the plaintiff in error: Wilson *v.* Dyson, Raym. 426; Chadock *v.* Cowley, Cro. Jac. 429; Roe *v.* Scott, *et al.*, 1 Fearne on Rem. 47, note; Haines *v.* Witmer, 2 Yeates 400; Clark *v.* Baker, 3 S. & R. 470; Heffner *v.* Knepper, 6 Watts 18; Lapsley *v.* Lapsley, 9 Barr 130; Smith's Appeal, 11 Harris 9; Cancel *v.* Creswell, 6 Casey 168; Hope *v.* Rusha *et al.*, 7 Norris 127. In one of the English cases, Roe *v.* Scott *et al.*, *supra*, the words were "if either of my three sons shall depart this life without issue of his or their bodies, then the estate or estates of such sons shall go to the survivors or survivor," and the words were held to create an estate tail. The devise in

Smith's Appeal was of real and personal property to the testator's children with a provision that in case of the death of any of them without issue, his or her share should be equally divided among the survivors, and, as to the land, it was held to pass an estate tail to the first taker.

The subsequent clause in regard to renting or selling the land can have no effect on the construction of the will, so far at least as the present question is concerned. All the questions arising in the case are so well discussed and the authorities so fully cited in the opinion of the learned Judge of the Common Pleas that it is unnecessary to add anything to what is there so well said.

Judgment affirmed.

ORPHANS' COURT.

O. C. of Schuylkill Co.

Bolich's Estate.

Decedents' estates—Promise by decedent to "pay when ready"—Payment by administrator.

An administrator is not entitled to credit in his account, for the sum paid to a church, the decedent having said he would pay such sum "when he was ready."

When no unfair motives can be imputed to exceptants or the administrators, the costs of audit should be paid by the estate.

Exceptions to Auditor's Report.

BECHTEL, J. The exceptants object to the credit of $50, found in the account, being a credit for money paid to the church of which deceased was a member. It is not claimed that the decedent actually subscribed this amount toward the erection of a new building, or that his estate had in any way become legally liable to the payment of the same. One of the accountants testifies that the deceased told him that he was willing to pay $50, and that he would pay more if he could. The other accountant says: "Sam (the deceased) had promised to pay something to the new church," he thought they should do with the old church, he told me he would pay $50 to the new church when he was ready, but did not, "and we were ready and we paid it because it was his disposition to pay it." We cannot regard these expressions as creating such liability as could be enforced against the objections of those who are interested in the estate. If the deceased desired to pay this amount to the church he was abundantly able to do so, having left an estate of $8000, clear of all liabilities. We now can regard only that which creates legal liability, hence we must sustain this exception. The last exception is to the action of the auditor in imposing the costs of audit upon the exceptants. At the time the exceptions to the account were filed and the account referred to the auditor, it contained a credit of $50 for the money paid the church, and also a credit of $24 in the items of iron railing for the cemetery lot. To these items the exceptants had a right to object, and their action in so doing cannot be said to have been brought about by improper motives. Their objections have to this extent been sustained. In disposing of this question of costs, we may also state that the administration continued the farming on the property of the deceased for a year or more after his decease. This necessarily involved the employment of considerable help, the expenditure of money, the marketing or disposing of the crops, &c., as well as other matters relating to the decedent's personal estate. Notwithstanding the result of this farming has been largely beneficial to the estate, yet we think it gave the exceptants reasonable grounds for desiring that the accounts arising therefrom should be inquired into and examined into by an auditor, especially in view of the fact that the administration of the entire personal estate shows considerable balance in favor of the accountants. For the reasons above stated we think the costs of audit should be paid by the estate, and we arrive at this conclusion because we think that no improper motives can be justly imputed, either to the administrators or exceptants. All other exceptions to the report of the auditor are hereby overruled.

YORK LEGAL RECORD.

VOL. II. THURSDAY, DEC. 8, 1881. No. 40.

COMMON PLEAS.

Walters v. Markey et al.

Judgment — Opening of—Minor—Failure of Consideration.

Where judgment was entered upon a joint "judgment note" executed by a minor and an adult, the judgment will be stricken off as to the minor, but not as to the adult.

The note in this case was executed before a Justice of the Peace, given in settlement of an alleged slander. Afterwards the Justice of the Peace, without the consent of the plaintiff, and in obedience to an order from the District Attorney, procured by one of the defendants, returned a surety of the peace case to the Court against the minor, for the alleged slanderous and threatening language used. HELD, not to be such a failure of consideration as will induce the Court to strike off the judgment.

Rule to strike off judgment.

The facts necessary to a proper understanding of this case are in substance as follows:

Mrs. Walters, wife of the plaintiff, appeared before a Justice of the Peace, and alleged that F. L. Markey had slandered and threatened her. The Justice instituted proceedings in the nature of surety of the peace, and the matter was finally compromised by the defendant, F. L. Markey, a minor, and his father, Jacob Markey, giving a note with warrant of attorney to the plaintiff. Judgment was entered on this note, and after the death of Jacob Markey, this rule was taken and the court asked to strike off the judgment on the ground of F. L. Markey's minority, and the fact that the surety of the peace case had been returned to the Court.

W. C. Chapman, for rule.

H. L. Fisher, contra.

September 19, 1881. WICKES, A. L. J. We are asked to vacate or open this judgment. First, because F. L. Markey was a minor at the time the judgment note was executed by him, and second, because of a failure of consideration. The infancy being duly proven F. L. Markey is entitled to have the judgment stricken off as to him. But does this operate to release Jacob Markey, the bail. It is argued that because the note is joint and not several that the bail cannot be proceeded against after the minor has been discharged from his liability.

It is said in 1 American heading cases 252, "that when an infant is a party jointly with others to a promissory note or other instrument, the English practice is, after all have been sued, and infancy has been pleaded, to discontinue, and begin another suit against the adults alone," and further it is said, "the practice almost universally established in this country, is, whenever one of several co-contractors is an infant, to sue all the parties to the joint contract, and if infancy is pleaded by one or, given in evidence, to enter a *nolle prosequi* as to him, or take issue on his plea, or allow a verdict to go in his favor, and take a verdict and judgment upon it against the others."

This course is recognized in Commonwealth v. Nesbitt, 2 Barr 16, and in Burke *v.* Noble, 12 Wright 175, in which it is clearly intimated that the *nolle prosequi* may be entered before or after judgment.

The plaintiff could therefore have pursued either of the courses indicated without impairing his right to proceed against the remaining joint obligor.

Can it affect his remedy that the judgment against the minor is vacated upon the petition of the minor and proof of his infancy.

Upon the authorities cited and Unangst *v.* Fitler, 3 Norris 135, we think not.

But it is said there is a failure of consideration here; the evidence does not so impress us.

It is evident that the surety of the peace and the alleged slanderous words complained of were both matters which the parties had a right to settle, and according to the evidence did settle as a consideration for the note in suit.

It does not differ in principle from Wyant *v.* Lesher, 11 Harris 339, and

Maurer *v.* Mitchell, 9 W. & S. 71, in which a compromise of a prosecution for bastardy was decided to be an adequate consideration for the bond. Nor do we understand that the legality of the consideration is questioned—it is said to have failed. I do not so understand the evidence. Mrs. Walters did all she could to settle the complaint made before the justice. That the justice subsequently returned it to the court was no fault of hers—but was done on the written order of the District Attorney, which order was conveyed to the Justice by Jacob Markey himself.

If this was a device of Markey's to produce a failure of consideration he ought surely not to reap the slightest benefit from it. If it was the unsolicited act of the District Attorney, why should Mrs. Markey's rights be affected by it.

It is nowhere suggested that she had anything to do with it. How then can she be held responsible.

For these reasons we make the following order. And now to wit: September 19, 1881, we make absolute the rule granted to show cause why the judgment should not be vacated as to F. L. Markey and discharge the rule to vacate or open the judgment against Jacob Markey or his administrators.

C. P. of Lancaster Co.

Turnpike Company v. Singer.

Justice of the Peace—Action for Penalty —Turnpike Company.

An action of debt for the penalty is sustainable before a Justice of the Peace, against a person who drives through the gate of a turnpike company without paying the toll when demanded.

The jurisdiction of the justice in such cases is conferred by the 19th section of the General Act of 26th of January, 1849.

Certiorari.

Geo. Nauman, for plaintiff.

Thos. J. Davis, for defendant.

November 19, 1881. PATTERSON, A. L. J. The exceptions to the proceedings are as follows:

1st. "The proceedings should have been begun by the complainant making oath as in all cases of misdemeanor—this being one—under Act of Assembly of April 30, 1879."

2d. "A warrant should have been issued and defendant arrested, and hearing held, instead of a summons being served upon him."

3d. "The defendant should have been duly convicted and sentenced by fine, instead of judgment being given against him as in a civil case."

4th. "Execution was improperly issued upon said judgment; it should have been a commitment to jail in default of payment of said fine."

5th. "The proceedings are all wrong, as they are in the nature of a civil suit instead of a criminal action."

An unusual number of exceptions have been taken to these proceedings, but none seemingly to the jurisdiction of the alderman.

This turnpike company, under the title of the "Conestoga and Manor Turnpike Road Company," was first incorporated by the Act of 18th of April, 1873, (P. L. p. 488), subject to all the provisions and restrictions of the general turnpike law of 26 January, 1849. There was a supplement passed and approved May 12, 1857, and by Act of 11th of April, 1863, in consequence of its old franchises being about to be sold at sheriff's sale, new corporators were authorized to purchase the same, and the style and title was changed to that of "The Millerville and Safe Harbor Turnpike Road Company." And, sometime in 1879, by and under the provisions of the Act entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the 29th day of April, 1874, by certificates expressly accepting the provisions of the new Constitution, produced to the Governor of the Commonwealth, and recorded in the office of the secretary of State, it was again rechartered, and under style and title now used as plaintiff in this proceeding. It thus became in part subject to the provisions of said

Act of 1874, while it remained invested with all the corporate powers, privileges and franchises before conferred, not inconsistent with said last mentioned Act and the said Constitution.

But it must be apparent that the said Act of 1874, by none of its provisions *for the recovery of fines and penalties*, authorizes this suit to be brought before the alderman in an action of debt for penalty.

Had the officer jurisdiction then in said suit, and are his proceedings regular and maintainable? All the exceptions are taken to the *form* of the action had before the alderman. And rule 7th of "Court Rules," p. 16th, says: "*The particular exceptions* in all cases of *certiorari* intended to be insisted upon must be filed on or before the first day of the term next after that to which they are returned, &c."

This suit as the record shows, was brought in debt for a penalty. The record also shows that the penalty sought to be recovered from defendant was because he drove through plaintiff's gate without paying toll when demanded. Is not so doing practicing fraudulent means or devices, with the intent that the payment of such toll may be evaded? If so, then the 19th sec. of said general Act of 26th of January, 1849, plainly gives the alderman jurisdiction, and authorizes the suit to be brought in its present form, to wit, as an action of debt for penalty. Said section reads that "if any person or persons whosoever, with intent to defraud the company; or if any person or persons shall, with such intent, take off or cause to be taken off any horse, &c.; *or practice any fraudulent means or device*, with the intent that the payment of such toll or duty may be evaded or lessened; all and every person or persons, *in all and every or any of the ways or manners offending*, shall for every such offence respectively, forfeit and pay to the president and managers of such turnpike road or plank road, as the case may be, any sum not exceeding ten dollars, *to be sued for and recovered with costs of suit*, before any justice of the peace, in like manner and subject to the same rules and regulations, as debts of a similar amount are by law sued for and recovered."

If that provision authorizes a suit in the nature of a civil suit, and we are of the opinion it does, then it follows that the record of the alderman before us is legal, and his proceedings must be sustained. Entertaining these views it is now adjudged that all the exceptions be dismissed, and the proceedings of the alderman are affirmed.*

C. P. of Delaware Co.

Stewart v. Hughes.

Practice—Costs.

In an action of trespass, commenced before a justice and appealed by the defendant, the plaintiff is entitled to full costs if the damages finally recovered exceed five dollars and thirty-three cents.

In an action of trespass for injuries to both real and personal property the plaintiff is entitled to full costs.

Where the defendant justifies his trespass, and claims a license to do the act complained of as an injury, the plaintiff is entitled to full costs upon his verdict.

Rule for judgment with no more costs than damages.

Trespass for entering plaintiff's land and killing his dog. The jury rendered a verdict for the plaintiff, whereupon the defendant took this rule.

CLAYTON, P. J. This was an action of trespass for entering the premises of the plaintiff and killing his dog. The defendant pleaded not guilty, with leave, &c., and gave notice that under his plea he would offer evidence, "that the entering by the defendant on the plaintiff's land and the killing of the plaintiff's dog thereon by the defendant, alleged as trespass in the plaintiff's declaration, were done by the defendant by the permission, consent and direction of the plaintiff."

The plaintiff is entitled to full costs upon three grounds, each of which would be sufficient to establish his right.

*See Com. *ex. rel.* Ernst v. Metzgar, *ante* 53.

1st. The action was commenced before an Alderman under the Act of March 22, 1814, and the damages finally recovered were over five dollars.

2nd. Because the question of damages was a mixed one, the suit being for the recovery of damages to real estate and personal property, in which case the statute of 22 and 23 Car. 2, restricting the costs to the sum awarded as damages, does not apply; Chapman *v.* Calder, 2 H. 359; Guffy *v.* Free, 7 H. 384; Simonds *v.* Barton, 26 P. F. S. 434. The fact that the judge affirmed the plaintiff's first point did not withdraw the question of damages for the killing of the dog from the jury. If the jury should find there was no license for the act and that the dog was not a public nuisance, they could, notwithstanding the charge of the court, have awarded damages to the full extent of the injury.

3d. But the defendant justified the trespass by his notice and attempt to prove a license to kill the dog. In this he failed to secure the approval of the jury, for if they had found his alleged license true, their verdict would have been for the defendant.

Rule discharged.

C. P. of Schuylkill County.

Grant v. People's Mutual Aid Society.

Arbitration—Costs.

A rule to arbitrate will not be stricken off, because the costs ordered to be paid on a former rule have not been paid.

Rule to strike off rule to Arbitrate.

An award of arbitrators in this case had been stricken off, and the plaintiff directed to pay the costs of the rule. The plaintiff did not pay the costs, but took out another rule to arbitrate. Defendant then took a rule to strike off the second rule to arbitrate, on the ground that plaintiff had not paid the costs on the first rule.

WALTER, J. The defendant's remedy to collect the costs is by execution or attachment.

Rule discharged.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Arbitrators — Want of Notice.— Where the plaintiff enters a rule to arbitrate in a suit against more than one defendant such plaintiff cannot proceed against one and obtain an award where he has failed to serve notice on the other defendants.—*City of Scranton v. Millspaugh et al.*, (Lackawanna C. P.) 13 Lancaster Bar 104.

Divorce—Issue—Time of asking.—In proceedings in divorce, where the respondent's answer did not demand a trial by jury, the libellant filed interrogatories and had an examiner appointed, cross-interrogatories were filed, one hearing had and witnesses examined before the examiner, and at the next meeting the libellant declined to proceed and applied, at the earliest practical moment thereafter, to the court for an issue. HELD, That she was in time and the issue granted.—*Beaumont v. Beaumont*, (Chester C. P.) 1 Chester County Reports 304.

Practice—Settlement — Effect of.—A discontinuance or non-suit or settlement of a cause allowed by the court while the same remains of record cannot be treated by one of the parties and the court as a nullity.—*Sherwood v. Yeomans*, 38 Legal Intelligencer 440.

Practice—Special verdict.—Whatever is not found in a special verdict is to be considered as not existing. The court must declare the law on the facts found alone. They must be self-sustaining and cannot be aided by any outside support. —*Appel et al. v. Byers et al.*, 12 Pittsburgh Legal Journal 133.

Will—Construction of—Illegitimates. —where two nephews, one legitimate and the other illegitimate, answer to the description in a will, the legitimate will take, and it is not competent to show by evidence *aliunde* the will that the testator intended that the bastard should be the object of his bounty.—*Appel et al. v. Byers et al.*, 12 Pittsburgh Legal Journal 133.

YORK LEGAL RECORD.

VOL. II. THURSDAY, DEC. 15, 1881. No. 41.

COMMON PLEAS.

Keesey v. Noedel.

Mortgage — Construction of—Sheriff's Sale—Distribution of Proceeds—Separate Funds.

A mortgage was given by N. to U., to secure an existing indebtedness from the former to the latter, which indebtedness was for acceptances of not s and draft by the latter for the accommodation of the former. HELD, that it cannot be stretched as to be made a security to U. and his partner for liabil.ti.s of N. and his partner.

Where the payments are general, and there is no appropriation either by the debtor or creditor, they must be applied in discharge of the earliest liabilities of a running account.

The liens against the defendant in an execution were, 1, judgment on all his realty, in favor of K.; 2, mortgage on part only, in favor of V.; 3, judgment on all, in favor of Z. K.'s judgment was paid in full, without designating any particular fund. HELD, that it is not presumed that K. first exhausted that fund upon which V. had no lien, where such presumption would work injury to the rights of Z.

Exceptions to Auditor's report.

The facts in dispute, together with the questions of law involved, are found in the following extracts from the report of the Auditor, John Blackford, Esq.:

At the time appointed by your auditor for a meeting before him, V. K. Keesey and John Gibson, Esqrs., appeared as counsel for Geo. F. Viator, and W. C. Chapman and N. H. Wanner, Esqrs., appeared as counsel for Lewis Zurn, and both parties claimed the fund in court.

The claim represented by Messrs. Keesey and Gibson rests, partially at least, upon a mortgage executed by the defendant in the above writ on the 30th of March, 1869, to one Frederick Ulrichs and by him assigned to Mr. Viator on 28th October, 1874. This mortgage, it was alleged by the counsel of Mr. Viator, was a lien upon that portion of Mr. Noedel's real estate, at the time of the sale, which produced the fund for distribution.

It was also contended by Mr. Viator's counsel that this mortgage coupled with the other evidence produced by them hereafter referred to by the auditor, entitled their client to the fund in court.

The claim presented by Messrs. Chapman and Wanner is based upon a judgment entered in your Hon. Court on June 15, 1875, in favor of Louis Zurn against G. W. Noedel, to No. 526 April T. 1875, for $1,500. The lien of this judgment is subsequent to the lien of the mortgage.

It was contended by the gentlemen representing this latter claim that if the mortgage, offered in evidence, was given for any purpose, it was for the purpose of securing Mr. Ulrichs as acceptor of certain notes and drafts to an amount not exceeding $12,000, accepted before and at the date of the mortgage by Hischman & Ulrichs for the accommodation of Noedel & Van Nes, which date is March 29, 1869. That this being so, Mr. Viator is not entitled to the fund in Court unless he shows that the acceptance of notes and drafts upon which he relies to establish his rights under the mortgage, were such as had been accepted by Hischman & Ulrichs before, or at the time, the mortgage was executed, or that they were renewals of such; and that this Mr. Viator had failed to do.

Mr. Zurn's counsel also contended that the mortgage was not a lien upon the entire real estate of Mr. Noedel at the time of the sheriff's sale, and that the proceeds of that which was not subject to the lien of the mortgage was properly applicable to the payment of their judgment inasmuch as the mortgagee had not compelled the prior lien creditor, who had a lien upon the whole property at the time of the sale to exhaust that fund upon which the mortgage had no hold.

This exception in the mortgage is of the distillery which was upon the premises at the time of the sale, and the ground appurtenant thereto not exceeding three acres. The distillery and ground excepted from the operation and lien of the mortgage was worth about one thousand dollars upon the day of sale.

The judgment upon which the real estate was sold was a lien upon all the property (real) of Mr. Noedel at the

time of the sale. This judgment was a prior lien to both the mortgage and judgment before mentioned and was paid to Mr. Keesey out of the fund realized from the sale without regard at the time, so far as the facts go, out of which fund the payment was made.

[The Auditor then proceeds to give a statement of the dealings between Hischman & Ulrichs and Noedel & Van Nes.]

On the 29th of March, 1869, Noedel & Van Nes drew a draft in favor of Harryman, Nipe & Co., for $190.67 at four months upon Hischman & Ulrichs who accepted the same without affixing any date to the acceptance. This acceptance your Auditor finds to have been made on the day the draft bears date.

* * * * * * *

A promissory note drawn by Hischman & Ulrichs in favor of Archiel Deutch & Co., for $681.36, at three months and is dated September 3, 1869, was offered in evidence. This note was given in settlement of a suit by the payers therein against Noedel & Van Nes upon a note drawn by them and which was a debt of that firm prior to the execution of the mortgage. It includes the amount of the note upon which Noedel & Van Nes were so sued, the costs of suit, the interest on the note and attorney's commissions.

There is no evidence to show that Hischman & Ulrichs were in any manner liable to pay this claim of Archiel, Deutche & Co. until they stepped in on Sept. 3 ,1869, and gave their own note as above set forth. Not a word was said about it in the conversation between Mr. Ulrichs and Van Nes and there is not a syllable of evidence, tending to fix a liability for its payment upon Hischman & Ulrichs before the 3rd of September, 1869. Your auditor therefore excludes this note from further consideration.

* * * * * * *

No acceptances of drafts for Noedel and Van Nes, excepting the two drafts heretofore mentioned, were charged to them prior to April 1, 1869, which shows that the liability incurred for other acceptances of drafts was subsequent to the mortgage.

The fund in Court with accrued interest is six hundred and thirty-two dollars and nineteen cents.

The mortgage offered in evidence by Mr. Viator, is from Mr. Noedel as mortgagor to Mr. Ulrichs as mortgagee. It recites an indebtedness from the former to the latter existing at the date of the instrument, and it further recites that this indebtedness of Mr. Noedel, "the party of the first part," to Mr. Ulrichs, "the party of the second part," was for acceptances of notes and drafts by the latter for the accommodation of the former. It nowhere appears upon the face of the mortgage that it was given as, or intended to be a security to *Hischman & Ulrichs* for acceptances of notes and drafts by them for the accommodation of *Noedel & Van Nes.*

It is an instrument securing Mr. Ulrichs as acceptor of notes and drafts for Mr. Noedel individually, and cannot in the opinion of your auditor be so stretched and distorted by the imagination as to be made a security to Hischman & Ulrichs for any liabilities of Noedel & Van Nes.

It it true that parol evidence is admissible for the purpose of showing the true intent of the parties to such an instrument when that intent is at variance with that which is expressed in the paper, *under some circumstances;* Lippincott *v.* Witman, 3 W. N. C. 313. But no such evidence was offered here, and under the terms of the mortgage Mr. Viator's claim based upon the acceptance of notes and drafts by *Hischman & Ulrichs* for the accommodation of *Noedel & Van Nes* must fail.

If, however, your auditor should be in error as to his construction of this mortgage, how would the claim of Mr. Viator then stand? The instrument, if a security at all to Hischman & Ulrichs for

acceptances of notes and drafts for the accommodation of Noedel & Van Nes it must be for only such notes and drafts as had been so accepted by them at and before the date of the mortgage, and for renewals of the same.

The mortgage recites, as before observed, an existing indebtedness on the part of the mortgagor to the mortgagee. It also sets forth specifically in what way the mortgagor was liable, *i. e.*, for acceptances of notes and drafts which had, at its date, been accepted by Hischman & Ulrichs—assuming that *Ulrichs* was intended to mean Hischman & Ulrichs. There has been but one draft offered in evidence by Mr. Viator's counsel, which it is possible in your auditor's opinion to bring within the terms of the mortgage. This draft is in favor of Harryman, Nipe & Co., and has been heretofore sufficiently described. If this draft has not been paid it is entitled to be paid out of the fund for distribution viewing the mortgage as a security for the liabilities of Noedel & Van Nes.

As has already been stated there was a mutual account between the two firms. In this account is found amongst the first items of charge the draft above mentioned—falling due as it did on 31st July, 1869. This item of charge was followed by a number of other charges of accepted drafts. Upon the credit side of this account Noedel & Van Nes are credited for moneys paid to them; for the proceeds of whiskey sold by Hischman & Ulrichs, and with other items of credit as is shown by reference to the accounts stated. These credits are largely in excess of what would have been sufficient to pay all the indebtedness of Noedel & Van Nes to Hischman & Ulrichs, which was due, prior to the charge of this Harryman, Nipe & Co. draft as well as the draft itself. These payments were credited generally on this account without any agreement between the parties as to the application of them. The cash as well as the whiskey was to pay the drafts accepted by Hischman & Ulrichs as they fell due.

The rule of law in such a case, as your auditor understands it, is that where the payments are general, and there is no appropriation either by the debtor or the creditor they must be applied in discharge of the earliest liabilities of a running account: Speck *v.* Comth., 3 W. & S. 328; Berghaus *v.* Alter, 9 Watts 394; Price *v.* Sweet, 9 Casey 151.

Under this ruling the Harryman, Nipe & Co. draft was paid in contemplation of law, and Mr. Viator's claim would be disallowed for that reason.

There is another view in which this matter has been presented to your auditor which is based upon the argument that Mr. Noedel's liability, if any exist under the mortgage, is that of a surety for Noedel & Van Nes, and that Hischman & Ulrichs having had in their hands the means of satisfaction and having voluntarily parted with such means Mr. Noedel is discharged from his liability as surety.

Your auditor is of opinion that if Mr. Noedel was liable to Hischman & Ulrichs under the mortgage his liability was only that of a surety for Noedel & Van Nes. The evidence shows that Hischman & Ulrichs had a sufficient amount of property in the shape of whiskey, belonging to Noedel & Van Nes to fully pay and satisfy the draft in favor of Harryman, Nipe & Co. It is also an incontrovertable fact that the acceptors of the Harryman, Nipe & Co. draft, returned to their debtors, Noedel & Van Nes, a quantity of whiskey largely in excess of what would have been sufficient to pay and satisfy the draft above mentioned if it had been sold and the proceeds of sale applied to that purpose.

Where the creditor has the means of satisfaction either actually or potentially in his hands and does not retain it the surety is discharged; Richards *v.* Comth. &c., 4 Wr. 146; Everly *v.* Rice, 8. Har. 297.

In the opinion of your auditor if there was any liability upon the part of Mr. Noedel, by reason of the mortgage, to Hischman & Ulrichs, it was such as above mentioned; and Messrs. Hischman & Ulrichs, by their manner of dealing with their principal debtors discharged their surety from all liablitiy under the mortgage.

The remaining question to be passed

upon by your auditor is as to the right of the mortgage to apply the proceeds of the sale of that portion of Mr. Noedel's real estate upon which the mortgage was not a lien, to the payment of the claims secured by the mortgage.

As has been before stated the judgment of Mr. Keesey upon which the real estate was sold, as well as the judgment of Mr. Zurn were liens upon the entire real estate of Mr. Noedel, while the mortgage was no lien upon a portion of the property sold, which at the time of the sale was worth about one thousand dollars.

Mr. Keesey's judgment was prior in lien and Mr. Zurn's subsequent to the mortgage. After the sale Mr. Keesey was paid in full and the remainder of the proceeds of sale is the fund to be distributed. This payment to Mr. Keesey was neither demanded nor made out of any particular fund, but was taken generally out of the proceeds of sale.

Mr. Viator's counsel contended that inasmuch as equity would have compelled Mr. Keesey out of respect to the rights of the mortgagor, to exhaust first the fund upon which the mortgage was no lien, he must be presumed for the benefit of Mr. Viator to have done so.

On the other hand Mr. Zurn's counsel asserts that inasmuch as Mr. Viator did not compel Mr. Keesey to take first the fund not applicable to the mortgage there is no legal or equitable presumption that such a course was pursued by the first lien creditor to the prejudice of Mr. Zurn's judgment whose legal and equitable right to the money is superior to that of one who had no lien upon it.

It may be true that the mortgagee had the right in equity to compel the first lien creditor to exhaust first the fund upon which the mortgage had no hold. Such rights however your auditor is of opinion may be waived as well as other rights. No presumption can arise in your auditor's opinion to favor one party to the exclusion of the rights of another, and where a party has neglected to invoke such aid as might put him in possession of the fund upon which his lien has no hold it would be *iniquity* rather than equity to admit any such violent presumption as is required in this case where the result might be to deprive one who had a fair and honest lien upon the fund of the benefit of it.

The time has passed when this distribution was made in which the mortgagee could have compelled the first lien to exhaust the fund upon which the mortgage had no hold. The fund taken by Mr. Keesey was not part of the fund for distribution, and about it there was not and could not be any inquiry before your auditor.

If there be any *presumptions* in the case they are in favor of payment of the creditor whose lien was upon the entire real estate of Mr. Noedel rather than in favor of one who contented himself with the security of only a portion of it.

The Auditor, after deducting the costs, "Awards to Louis Zurn, plaintiff in judgment No. 526, April Term, 1875, $565.37."

To this award, counsel for Viator filed the following exceptions:

1. The auditor erred in awarding to Louis Zurn, plaintiff in judgment No. 526, April Term, 1875, the sum of $565.37.

2. The auditor erred in not awarding said sum of $565.37 to Geo. Fredk Viator, on mortgage executed by G. W Noedel, on the 30th March, 1869, to Frederick Ulrichs, and assigned to Mr. Viator, 28th October, 1874.

3. The auditor erred in excluding the note drawn by Hischman & Ulrichs in favor of Atchiel, Deutsche & Co., for $681.36, at 3 mos. dated September 3, 1869, which was given in renewal of a note drawn by Noedel and Van Nes prior to the execution of said mortgage and in not awarding the balance for distribution to the holder of said mortgage on account of said note.

4. The auditor erred in not awarding to the holder of said mortgage the amount of the draft in favor of Harriman, Nipe & Co. for $190.67, at four months upon Hischman & Ulrichs, and accepted by them, at the date of 29th March, 1869, prior to the execution of the said mortgage.

John Gibson and V. K. Keesey for exceptions.

N. M. Wanner and W. C. Chapman for report.

FISHER, P. J. Exceptions dismissed and report of auditor confirmed.

YORK LEGAL RECORD.

VOL. II. THURSDAY, DEC. 22, 1881. No. 42.

COMMON PLEAS.

Fuhrman v. Fuhrman.

Judgment—Presumption of Regularity of—Credits on.

In a contest between plaintiff and defendant in a judgment, as to whether certain payments were made on it, if the only evidence is that of the parties thereto. the credits can not be allowed. The presumption of the law is in favor of the regularity of the judgment, and the burden of proof is on the party attempting to show the contrary.

Rule to show cause why certain credits should not be allowed, &c.

V. K. Keesey, for rule.

S. H. Forry and W. C. Chapman, contra.

A question of fact is involved in this case which it were better perhaps had been submitted to a jury, and which we suggested at the argument, but as counsel on both sides desire to have it disposed of by the Court, and it was within our power to hear and determine the matter in controversy, we have done so, and we are now requested by defendant's counsel to file an opinion giving our reasons for the conclusion at which we arrived.

Emanuel G. Fuhrman, the defendant executed a judgment note in favor of Elias G. Fuhrman, the plaintiff, for $3,274.96 on which judgment was entered to April Term, 1872, No. 461, and a fi. fa. issued thereon to January Term, 1876, No. 23, and the sheriff has made his levy on defendant's real and personal estate.

The defendant has presented his petition to the Court in which he alleges that certain payments made by him on this judgment have not been credited, some of which are admitted, but a credit of four hundred dollars, which defendant claims he paid and is entitled to have deducted from the amount of the judgment, is denied by the plaintiff, and it is in regard to this payment that the question of fact has arisen which the Court is asked to decide.

We must not forget in approaching this question that this judgment like every other is in contemplation of law not the act of the parties, but of the Court, and that every *presumption* is in favor of its regularity and its correctness; the burden of proof therefore, in any contest which arises in regard to it, is thrown by operation of law, upon whoever assails it, even though it be the defendant himself, and if the only evidence in the case was the conflicting testimony of the plaintiff and defendant, one of whom swears the four hundred dollars were paid and the other that no such payment was made, the Court would not permit the amount of the judgment to be rendered, but would give the plaintiff the benefit of the presumption in its favor.

But a vast amount of testimony has been taken tending to show the correctness of each conflicting statement, which we have carefully examined. The judgment was given for the purchase money of real estate which defendant bought of plaintiff, and the deed for which was delivered in July, 1872. At the time of the delivery of the deed at the office of S. H. Forry, Esq., the sum of $400 was deducted from the amount of purchase money by consent of both parties, and a judgment note given for the balance. Subsequently a receipt is entered on the conditions of sale by Elias G. Fuhrman, the plaintiff, for $550, which Elias alleges embraced the $400 paid before the delivery of the deed and which Emanuel the defendant, alleges does not embrace that amount. This is the only question before us, as the remaining credits claimed, viz: $150 in 1873, $100 in 1874, and $500 in 1875 are admitted by plaintiff and are to be credited on the execution. Nor is the other question raised in the petition, as to whether the defendant is entitled to deduct a legacy due him from his father's estate pressed in the argument, but the whole question presented to the Court relates to the four hundred dollars of which we have spoken.

It is a singular fact in this inquiry,

that the defendant upon whose testimony this credit must be allowed, if allowed at all, has exhibited an infirmity of memory in reference to the time and place of making this payment, which must seriously impair the value of his testimony that he made it at all.

He was asked for example whether he told S. H. Forry, Esq., at his office and in the presence of plaintiff, that he paid these $400 in his office at the time the judgment note was written in July, 1872, and he denied having said so. But Mr. Forry when called on to testify, asserts most positively that not only on one occasion, but on two distinct occasions this defendant declared to him in his office that he paid the $400 there, that he counted it down to him on his desk, and reasserted this same thing as late as 1875, when they met at his office to adjust if possible their differences.

This defendant also states that he never told Peter Resh that he had paid $650 on the land. Peter Resh has been sworn as a witness in the case and says that in 1874, long after the delivery of the deed, between harvest and seeding, that he was in defendant's yard, and that defendant told him he had paid $650 on the place he had bought—that he paid $400 before he had given plaintiff the judgment and that was taken off from the judgment bond, and that he had given him $150 after he had given the judgment bond, and that all he had paid was $650 marked on the conditions of sale and $500 he had given him for Jesse Fuhrman; that they kept an account of these matters on a little memorandum paper, and that when he got his deed they counted it up and wrote it on the conditions of sale.

True it is contended by defendant's counsel that these contradictions, with others not alluded to here, relate to immaterial matters, to some extent matters brought out on cross examination. But are these immaterial matters? Are they not very material in a controversy where the memory of one man is so pointedly placed in opposition to the memory of another. If a defendant tells you I paid you $400 in a certain office, although the time and place of payment is not the essential part of the matters and you show conclusively that no such payment was or could have been made at such a place, is this not material in a contest as to whether the payment was made at all, to show at least the infirmity of the witness' memory? But independent of this view of the case, certainly what defendant said to Peter Resh as to his payments, and all of which corroborates the plaintiff's account of the transactions, is substantive evidence, clearly admissible, and entitled to great weight in determining this question of fact. How are we to say that this defendant was wrong in the account he gave the witness Resh of this matter, when he was nearly two years nearer in point of time, to the transactions of which he spoke, than he was, when he delivered the evidence read to the Court, and upon which he so greatly relies.

We need scarcely go more into the details of this testimony—we are convinced that this credit of four hundred dollars ought not to be allowed—that the remaining credits should be allowed, and the costs of this proceeding ought to be paid by the plaintiff in the execution.

Inners v. Hartman.

Execution — Condemnation — When set aside—Exemption.

An inquisition of the defendant's real estate will be set aside where the Sheriff refuses to appraise and allow the defendant to retain the $300 exempted by law.

The Sheriff is bound to notice the defendant's demand for an appraisement, and can not inquire as to the defendant's right to claim the benefit of the exemption law.

Rule to set aside inquisition, &c.

The attempt on the part of the plaintiff in this case to recover the money loaned by him to the defendant, gave rise to a litigation which continued for nearly nine years. The facts are in substance as follows:

Conrad Inners loaned unto the defendant $450.00, and took as security therefor

a note with warrant of attorney to confess judgment, signed by the defendant and his wife. At the time of the execution of the note, the defendant was in the possession of certain real estate, the title to which, however, was in his wife. The plaintiff knew of this fact when he loaned the money. The wife had no separate estate, and acquired title to the property only by a conveyance from her husband to her, which conveyance was purely voluntary, and without any financial consideration; but, as was subsequently decided by a Commissioner, Referee and two Judges, said conveyance was not in fraud of existing or subsequent creditors.

Judgment was entered upon the note, and execution issued against the makers. The wife presented her petition for leave to open judgment, etc., and, after argument, the judgment was stricken off as to her.

Another execution was issued, against the defendant alone, whereupon the defendant demanded of the Sheriff an appraisement and allowance to him of $300 of property, as provided by the exemption laws. This demand the Sheriff refused, and proceeded to hold an inquisition, and condemned the above mentioned real estate. To this condemnation this rule was taken.

A. T. Patterson for rule.

M. S. Eichelberger and John L. Mayer contra.

FISHER, P. J. The real estate of the defendant was levied upon by the Sheriff, and condemned, and an application made to set aside the condemnation because at the time the levy was made or shortly afterwards the defendant claimed the right to have retained and appraised and three hundred dollars set apart for his use out of the proceeds of sale under the exemption act. The Deputy Sheriff levied the real estate of the defendant on the 6th of July, 1872; on the 8th of July notice was served upon him in writing, that defendant asked, an appraisement and demanded three hundred dollars out of the proceeds; on the 3rd of August the property was condemned, no appraisement having been returned or held, and no mention of the demand for the exemption having been made by the defendant.

We think the Sheriff was bound to notice the defendant's demand. The requirement of the act of assembly is mandatory and that he is not the judge of the propriety of the demand nor the power to determine the right of the defendant to make it. Many cases decide that a Sheriff is liable to an action if he does not comply with the requirement of the act of assembly regarding sheriff's sales; but it is not the only remedy the defendant can have. He has a right to have extended to him all the privileges the law gives him, and if the sheriff does not comply with the requisitions of the law regarding writs of execution, the defendant may ask the court to set aside the proceedings. In a case lately decided in our Supreme Court where a levy was made on personal property and there was not given the requisite number of days' notice of the time and place of sale, the Sheriff was held a trespasser *ab initio;* Carrier *v.* Esbaugh, 20 P. F. Smith 239. "Selling the goods without notice was not merely an abuse; it was an act done without authority, and against law," says Mr. Justice Williams in his opinion in that case. We will not say that the condemnation in this case was without authority; but we will say it was an abuse of the writ, and against the express letter of the statute, and therefore against law, and for that reason the inquisition ought to set aside.

The affidavit in this case made by the defendant asks relief alone upon the ground that the sheriff refused to summon appraisers to value the property and retain his claim of three hundred dollars under the exemption act. But it is said that the testimony taken and read in behalf of the defendant goes to show that the property belongs to the wife of the defendant and not to him. We admit

that where a party declares that he has no interest in the property he cannot at the same time claim an allowance under the exemption law. In this case, however, the affidavit for relief is only founded upon the allegation that the sheriff refused to make the appraisement as demanded. Why the other evidence was given I do not know; certainly it had nothing to do with the application as originally made to set aside the condemnation.

Rule made absolute.

Conrad Inners died, and his administrator issued an *alias fi. fa.*, followed by a *pluries*, and a second *pluries*. Another inquisition was held, to which exceptions were filed, but the exceptions were dismissed. A *vend. ex.* was issued, and the property sold as the real estate of the defendant. No formal notice was given at the time of the Sheriff's sale, that the property was claimed by the wife. The proceeds were ruled into Court, and before the Commissioner appointed to distribute the same, the defendant claimed $300.00 thereof, under the provisions of the exemption law. This claim was allowed by the Commissioner, but, upon exceptions being taken, the Court (WICKES, A. L. J.) overruled the Commissioner's finding in this respect and disallowed the claim. [See Inners *v.* Hartman, *ante* 35.]

The property was purchased at the Sheriff's sale by Frederick Hockemeyer, and the Sheriff's deed for the same delivered to the purchaser. Leah Hartman, wife of the defendant, asserted her title to the property, and refused to deliver possession to the Sheriff's vendee. He then instituted an action of ejectment for the recovery of the property, a report of which will be found in Hockemeyer *v.* Hartman, *infra* 173.

Meanwhile, during the progress of the cause, a change had taken place in counsel, as well as parties. The administrator of Conrad Inners was represented by E. W. Spangler, Esq., who appeared for the exceptant in Inners *v.* Hartman, *ante* 35.—A. T. Patterson, Esq., who appeared for the claimant (Hartman) in that case, died before the filing of the Court's opinion therein. John L. Mayer, Esq., one of the counsel for the original plaintiff, also died during the progress of the cause. Thus the gist of the whole dispute—the ownership of the real estate sold by the Sheriff—was decided in a new case, under a new title, and without any of the original counsel.

[See Hockemeyer *v.* Hartman, *infra* 173.]

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Building Association — Charter of.— Where courts are authorized to approve articles of association they must see that the articles conform to the statute in all essential particulars. Where, however, an association has been conducted for years as if duly constituted, a party who has reaped the advantages and profits of its business will not be allowed, for his own benefit, to question the legality of its transactions. He will be held estopped.—*Mechanics' Building and Loan Association v. Minnich,* (C. P. of Luzerne County), 10 Luzerne Legal Register 323.

Will—Construction of—Life estate.— Where P., by his will, bequeathed the residue of his personal estate to his wife, during her life, providing that, in case of her death before the same was expended for her use, the residue should pass over, HELD, that the wife was entitled to receive said residue absolutely, without giving security. The gift of the produce of a fund is a gift of the fund itself.—*Potter's Estate,* (Chester C. P.) 1 Chester County Reports 318.

YORK LEGAL RECORD.

VOL. II. THURSDAY, DEC. 29, 1881. No. 43.

COMMON PLEAS.

Hockemeyer v. Hartman.

Conveyance to wife—Notice of—Disputed title—Sufficiency of notice at Sheriff's sale—Judgment—Sale under a judgment whose lien has expired.

I loaned money unto H., and took as security therefor, a judgment note executed by H. and his wife. At the time of the loaning of the money, H. was in possession of certain real estate, the title to which was in his wife; of which fact I. had knowledge. Judgment was entered upon the note, execution issued, and the real estate sold to F. H. HELD in an action of ejectment brought by F. H. against H. and wife, that I. having knowledge that the title was in H.'s wife, the presumption of law is that he loaned his money upon the credit of H., and he could not therefore resort to the land in dispute; and hence no title passed by the Sheriff's sale to F. H. which could defeat the wife's title.

No formal notice was given at the Sheriff's sale that the wife of H. claimed the property, but the purchaser testified that "I heard it said before I purchased the land, and on the day of sale, that Leah Hartman had the title to the land." HELD, to be sufficient notice to the purchaser that the title was in Mrs. Hartman.

The judgment of I. against H. and wife was entered on April 2, 1869; the real estate was sold October 17, 1876. HELD, that the judgment having lost its lien before the Sheriff's sale, the sale was invalid, the deed passed no title, and the plaintiff cannot recover.

Exceptions to Referee's report.

The facts in this case, previous to the impetration of the suit, which was an action of ejectment, are given in Inners v. Hartman, *ante* 170. John W. Bittenger, Esq., was chosen Referee, and found for the defendant, for substantially the reasons set forth in the defendant's first point, and the Referee's answer thereto:

Point. If the referee believes from the evidence that Conrad Inners, when he took his judgment against Leah Hartman and Tobias Hartman by proceedings upon which the property in dispute was sold by the sheriff to the plaintiff in this suit, knew that the real estate in question had been conveyed to said Leah, the presumption of law is that he loaned his money upon the credit of Tobias Hartman, the husband of Leah, and the could not therefore resort to the land in dispute for the payment of the money so loaned and therefore no title which could defeat the title of Leah Hartman passed by the sheriff's deed to the plaintiff in this suit.

Answer. The referee read this point and answered it as follows: The evidence shows that Conrad Inners at the time of the taking of his judgment knew that the deed for the property in dispute either had been or would be made to Leah Hartman, and further knew his judgment would not be a lien on the land by reason of the coverture of said Leah Hartman. The proposition of law contained in this point is therefore correct.

To this report exceptions were filed by the plaintiff.

Edward W. Spangler and James B. Ziegler for exceptions.

Blackford & Stewart, contra.

FISHER, P. J. This is an action of ejectment brought to recover a small tract of land situated in York township. The case was submitted to a Referee. We agree with him in his views of the legal questions involved, and are of the opinion that the cases of Snyder *v.* Christ, 3 Wright 499; Trench *v.* Mehon, 6 Smith 286, and Thompson *v.* Thompson. 1 Harris 380, sustain him, and although we can not sanction all his rulings or admissions of evidence, we do not think it necessary to notice them. There is an important, vital fact in this case, which was not taken notice of before the Referee, but was mentioned by him in his report, and that is, that the judgment upon which the Sheriff's sale was made had lost its lien at the time of the sale. But on the argument of the exceptions to the report of the Referee it was contended that the Sheriff's sale passed no title to the plaintiff because the judgment upon which it was sold was not a lien on the premises, which were the subject of the sale.

The judgment was entered on the 2nd day of April, 1869, for $450, against Tobias Hartman and Leah his wife, on a bond and a warrant of attorney to confess judgment. On the 29th of April, 1872, the name of Leah Hartman, one

of the defendants was stricken from the record, by order of the Court, on the ground that Mrs. Hartman could not execute a bond with warrant of attorney to confess judgment. Afterward, a *fi. fa.* and *vend. ex.* issued against Tobias Hartman and his interest in the land in question, in this case was sold to Frederick Hockemeyer, by virtue of a *venditioni exponas* issued September 13, 1876, acknowledged in open Court, and delivered to the plaintiff, and recorded in Sheriff's deed docket, page 77.

The Referee in his answer to the defendant's 6th point, a part of which was that Hockemeyer had notice either actual or constructive at the time he purchased at Sheriff's sale, that said Leah Hartman had the title to the property in question, answered, "That Hockemeyer had the notice mentioned in the point." The Referee's notes do not show that any public notice was given at the Sheriff's sale that Mrs. Hartman owned the property, but Hockemeyer, the plaintiff, in his testimony states that "I heard it said before I purchased the land and on the day of sale that Leah Hartman had the title to the land." From this testimony the Referee decided rightly that the plaintiff had notice that the title was in Mrs. Hartman.

But was the judgment a lien upon the property sold, and if it was not did the levy of the *fi. fa.* make it one? The Act of the 21st of March, 1827, Section 1, provides that judgments shall not continue a lien for more than five years, unless revived, although execution may have issued, P. L. 126. In the appeal of Stephen's Executors, it was held, "that after the lien of a judgment is gone, a seizure and extent of land, on an execution will not continue the lien because a judgment and an execution thereon have not independent liens; 2 Wright 15; Duer *v.* Eastman, 8 Harris 260.

The *fi. fa.* is a mere instrument for enforcing the lien of a judgment and does not constitute the lien as it does when levied on personal property, or on real estate on a *testatum fi. fa.* issued on a judgment in another county and which never was a lien on any lands except in the county in which it was entered.

In Jameson's Appeal, 6 Barr 282, the *fi. fa.* had been levied upon the land while the judgment was a lien, but before the sale by the Sheriff it had expired, and the Supreme Court held that judgments subsequent to Jameson's were entitled to the money. In Packer's Appeal, 6 Barr 279-80, it is admitted that on lands acquired after the judgment a lien may be attained by a levy of a *fi. fa.*, but if this is so the reasons must be that a *scire facias* could not issue on such a judgment to revive a lien because there was no lien to revive, and the only way to effect the desired end would be to proceed by *fi. fa.* and *vend. ex.* to sell the after acquired property. But this is not the case here as the judgment of Inners' administrator had lost its lien on the property previously acquired. As the deed was executed to Mrs. Hartman on the 3rd day of April, 1868, but not delivered until the 2nd of April, 1869, and the judgment in question was entered on the 2nd of April, 1869, so Packer's Appeal does not apply to this case. As the Inners judgment on which the sale was made had lost its lien before the sale was made to the plaintiff it does not come within the two excepted cases where the *fi. fa.* and the *venditioni* make the lien. For that reason the Sheriff's sale and deed conveyed no title, and the plaintiff cannot recover.

Exceptions dismissed and report of Referee confirmed.*

*See, however, Carl *v.* Strine, I YORK LEGAL RECORD 141, in which Judge WICKES held that a sale under a *vend. ex.* held after the lien of the judgment had expired, conveyed the defendant's title, and was good as against him. Also, Reynold's Appeal, *ante* 77, in which the Supreme Court decided that a *vend. ex.* can only issue while the judgment is a lien.—ED.

Hurah v. Gross.

Referee—Reading of extract before—Evidence—Setting aside of report.

In a suit before a Referee, where the controversy turned upon the soundness of a horse, the defendant's counsel read before the Referee an extract from "Wilkes' Spirit of the Times," containing the opinion of the editor of that paper on the very question involved in this inquiry, and based upon a statement of facts submitted to that journal by the defendant's counsel. The Referee found for the defendant. HELD, that the reading of such an extract before a jury, even by way of argument or illustration, would be sufficient cause for a new trial, and therefore the report of the Referee was set aside.

Exceptions to Referee's report.

WICKES, A. L. J. The defendant in this case sold a horse to plaintiff and guaranteed his soundness at the time of the sale. The question therefore in controversy relates to the soundness of the horse at the time of the transaction. On the argument of the case before the Referee defendant's counsel was permitted to read as part of his argument, plaintiff objecting, an extract from "Wilke's Spirit of the Times" containing the opinion of the editor of that paper in the very question involved in this inquiry, and based upon a statement of facts submitted to that journal by the defendant's counsel.

We think the Referee erred in permitting this extract to be read, after plaintiff objected, notwithstanding the view suggested by the counsel and Referee, that it was only an illustration of defendant's argument and not offered as evidence. It was clearly inadmissible as evidence, and not within the rule which permits a pertinent question or extract from a work of science or art, or from a classical or historical publication to be read by way of illustration or argument. And if presented in this way to the Referee, as it doubtless was, it was simply an attempt to get improper matter before him, in the form of an illustration, and as much an abuse of the privilege before referred to. The Referee is, we have no doubt, entirely unconscious of any influence produced upon his mind, by this extract, but however that may be, it would certainly be ground for a new trial, had it occurred before a jury, and we can perceive no reason why a different rule should prevail, when the trial is before a Referee. This view of the case renders it unnecessary to consider the remaining exceptions.

A question of fact is involved, in regard to which the evidence is conflicting; we think, therefore, it is better it should be submitted to a jury than that we exercise the power conferred by the Act approved the 9th of April, 1868, and enter such judgment upon the law and evidence in the case as we deem proper.

The fourth exception to the report of Referee is sustained and the report set aside.

Goodman v. Wireman.

Personal Property—Sale of—Delivery of—Order.

A. gave an order to B. on C. as follows: "Mr. Hess Goodman, York, Pa. Dear Sir: Any goods you sell to Mr. S. Gibson in am't not exceeding one hundred dollars, I will pay you in ninety days. I know Mr. Gibson to be reliable. I W. G. Wireman." B. bought the goods of C., had them mark d wi h his name, and some of them moved into another room. Afterwards he disposed of them to C. HELD, that there was such a sale and delivery of the goods to B. as enabled him to dispose of them as he saw fit, and rendered A. liable to C. for their payment.

Exceptions to Referee's report.

FISHER, P. J. From the testimony of Samuel Gibson, Wireman not having been examined as a witness to contradict him, it appears that I. W. G. Wireman, the defendant, was indebted to him $945, and gave him an order on the plaintiff for $100 worth of furniture. The order was in the following words:

MR. H. GOODMAN, York, Pa. Dear Sir: Any goods you sell Mr. Gibson in am't not exceeding one hundred dollars, I will pay you in ninety days. I know Mr. Gibson to be reliable.

I. W. G. WIREMAN.

This order I consider an original undertaking by Wireman to pay for one hundred dollars' worth of good, to be sold to Gibson. There does not seem to be any idea in the mind of Wireman that the goods were to be paid for by Gibson, but by Wierman; and all to be a credit on the indebtedness of the latter to Gib-

son. That being so Wireman was the principal debtor and no question of surety or guarantee can arise in the case. Under the circumstances we think the marking with the name of Gibson of the articles and their being set apart and some of them moved into another room was such a perfecting of the sale as vested the property in Gibson, who at the time he selected the articles delivered to Goodman the order of Wireman. The property being in Gibson by these acts, (although there was no actual delivery) he had a right to sell or dispose of them to Goodman or any other person he chose to deal with; at whatever price he could get for them. We therefore think that the plaintiff is entitled to recover and that the report of the referee ought to be approved and confirmed.

Exceptions dismissed and report of referee confirmed.

Boner v. Miller.

Act of 1729 — Marrying minors—Former recovery of penalty.

The father of a minor child brought suit against the defendant to recover the penalty imposed by the Act of 1729 upon clergymen marrying minors without the consent of their parents. Afterwards, the mother of the other minor brought a similar suit, and recovered judgment. HELD, to be a bar to the recovery of the penalty by the father.

Plea of former recovery.

FISHER, P. J. The only question raised on the pleadings in this case is whether a recovery of a judgment on a subsequent suit by the mother of a minor intermarried with the son of the plaintiff in violation of the act of 1729-30 is a bar to the recovery of the penalty inflicted by that act, on a prior suit instituted by the father of one of the minors illegally married by the defendant.

In actions like the present it is well settled that there can be but one recovery of the penalty for the offence of marrying a minor son to a minor daughter without the publication of the banns and without the assent of their respective parents. In Burns v. Bryan, 1 Pittsburg Report 191, it was held by Judge Williams in the District Court of Allegheny, that the recovery of one parent who sues after the impetration of a writ issued by the other parent is a bar to the former suit unless the judgment is collusive, and we think his decision is a correct one. In the present case the pleadings contain no allegation of fraud and collusion and as no disputed fact is put in issue by the pleadings, but the issue raised is one of law, we must render judgment for the defendant.

Judgment for the defendant.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Administrator—Leave to Bid at His own Sale.—Where an administrator asks leave of Court to bid at his own sale, the record should show that the sureties of the administrator are willing their principal should obtain such leave.—*Lewis' Estate,* (Chester O. C.) 1 Chester County Reports 313.

Mortgage — Forgery of—Defence to.—No man can be deprived of his property by a forged deed or mortgage, and against such a defence the magistrate's certificate of acknowledgment is not conclusive, no matter what may be the *bona fides* of the holder. The assignee of a forged instrument has his remedy against the assignor, who always impliedly warrants the genuineness of it.—*Reineman v. Moon,* 12 Pittsburgh Legal Journal 167.

Vendor and vender—Refusal to receive purchased goods — Measure of damages.—In an action by a vendor against his vendee to recover damages because of the refusal of the latter to receive the goods sold, the proper measure of damage is the difference between the price agreed to be paid and the cost of the article to the vendor.—*Allegheny Valley Railroad Co. v. Steele,* 12 Pittsburgh Legal Journal 158.

YORK LEGAL RECORD.

Vol. II. THURSDAY, JAN. 5, 1882. No. 44.

QUARTER SESSIONS.

Com. v. Ream. Com. v. Meier.

Criminal law—Power of jury to designate prosecutor—When costs should be imposed upon.

Under the Act of 1860, the jury has the power to find and designate the actual prosecutor in the case, even though the person so designated be other than the one named as prosecutor on the indictment.

The act of 31 March, 1856, P. L. 205, relative to the duty of constables to make return of violations of the law by liquor dealers, can have no effect upon the power of the jury to designate the true prosecutor, and impose the costs upon him.

Where a prosecution is brought through malice or ill-will, or without probable cause, the jury may rightfully impose the costs upon the prosecutor; but where there is no evidence of such malice or ill-will, where a probable cause existed, and only a sense of duty induced the bringing of the prosecution, the costs should not be imposed upon him.

Rules to show cause why so much of the verdicts of the juries as imposes one-half of the costs upon the prosecutors should not be set aside.

Cochran & Hay for rule.

W. C. Chapman, contra.

WICKES, A. L. J. Rules to show cause why so much of the verdicts of the jury in each of the above cases as imposes one-half the costs upon the prosecutors named in the verdicts, should not be set aside, were granted at the instance of the commonwealth, and have been argued before us. The indictments were based upon returns made by constables under the provisions of the 33rd Section of the act approved the 31st of March, 1856, P. L. 205, requiring constables of wards and townships to make return of retailers of liquors, and also whether within their knowledge there is any place kept and maintained in violation of law:

"And if any person shall make known in writing, with his or her name subscribed thereto, to such constable, the name or names of any one who shall have violated this act, with the names of witnesses who can prove the fact, it shall be his duty to make return thereof, on oath or affirmation, to the Court, and upon his wilful failure to do so, he shall be deemed guilty of a misdemeanor, and upon indictment and conviction, shall pay a fine of fifty dollars, and be subject to imprisonment at the discretion of the Court, of not less than ten nor more than thirty days."

The defendants were both acquitted, and the jury in the first case named Thaddeus K. Kauffelt as prosecutor, and directed him to pay one-half the costs, and in the second case named David Fahs as prosecutor, and directed that he pay one-half the costs.

Kauffelt had only given verbal notice to the constable, but Fahs had made known in writing the complaint against Meier, under the provisions of the Act of 1856.

On both indictments the names of the constables who made the returns were endorsed as prosecutors.

There are two questions presented: First, had the jury the power to go behind the officers' names, indorsed on the bills, and inquire who the actual prosecutors were; and secondly, ought they, under the evidence in these cases, to have named these parties as proscutors.

The 62 Section of the Act of March 31, 1860, 1 Purdon 390, place 65, says that in *all prosecutions,* cases of felony excepted, if the bill of indictment shall be returned *ignoramus,* the Grand Jury returning the same shall decide and certify on such bill whether the county or the prosecutor, shall pay the costs of prosecution; and in *all cases of acquittal* by the petit jury, on indictments for the offences aforesaid, the jury trying the same shall determine by their verdict, whether the county, or the prosecutor, or the defendant, shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the Grand or Petit Jury so determining, in case they direct the prosecutor to pay the costs, or any portion thereof, shall name him in their return or verdict.

It is conceded that costs cannot be imposed upon a public officer, while acting in his official capacity; but the argument here is, that not only is the jury forbidden to name the constable as prosecutor, because of the policy of the law, but that the Act of 1856, by some subtle agency, wholly incomprehensible to us, takes away the power conferred by the Act of 1860, and that the moment an officer's name appears as prosecutor, although compulsory under the act, that *eo instanti* a line is drawn, beyond which the jury trying the case can not investigate—cannot do that which the Act of 1860 requires them to do "in *all prosecutions*, cases of felony excepted," viz., in case of acquittal, "determine whether the county, or the prosecutor, or the defendant, shall pay the costs," and if the prosecutor, "to name him in their return or verdict." If the jury are to be limited in their inquiry to the name endorsed on the bill as prosecutor, why does the act require them to *name* him? It certainly means more than a mere matter of form, and it is admitted that in ordinary prosecutions the jury have the right to ascertain the actual prosecutor, without regard to the name which happens to be placed on the bill. But it is insisted the Act of 1856 changes all this. Why? Certainly the Act of 1856 is anterior in date to the Act of 1860, and if they operate at all upon each other, the subsequent act would prevail, according to the simplest rules of construction; but there is no conflict arising under these acts. One relates to the duties of constables, the other prescribes the duties of juries.

It must be borne in mind that these are not cases in which the officers returned "within their knowledge, places kept in violation of law." In that event they would be the real prosecutors, and for their honest mistakes it would be manifestly proper the county should pay, because the policy of the law would not allow an officer to be thus embarrassed in the discharge of his official duties. But here the officers' return is compulsory. It is not pretended they knew aught of the violations of law complained of by these prosecutions. Why then should any policy of law stay the inquiry of the jury? Why compel the constable to bear the shield behind which others may safely fight?

If the jury cannot name the prosecutor, then they can only impose costs on the defendant, or the county. In a case where there is no evidence of guilt, it would surely be proper to make a defendant pay what is really a penalty; and hence only the county is left to be saddled with this burden; and to "this complexion it must come at last," if the argument of the Commonwealth's counsel is correct.

As was said of the Act of 1804, of which the 62 Section of the Act of 1860, above cited, is a substantial re-enactment, we must bear in mind that costs are intended by this Act as a punishment for the malice of the party who, without cause, puts a defendant to the shame and expense of a public trial. If there is cause, we know very well the power of the jury to impose costs upon a defendant, under the act of 1860, although they may acquit him. But commenting upon the old Act of 1804, C. J. Tilghman, in Com. *v.* Harkness, 4 Binney 196, took occasion to say, "that laws obliging the respective counties to pay the costs of prosecution in all criminal cases where the accused are acquitted, have a tendency to promote litigation, by enabling turbulent and restless people to harass the peaceable part of the community, with trifling, unfounded, or malicious prosecutions, at the expense of the public."

We do not, of course, mean to apply the strong language of the case to the cases before us. We are only arguing the abstract question of law which is involved, and which must always be considered irrespective of particular cases or persons; and we certainly think it

true, that if any one can institute a prosecution by compelling a constable to make a return under the Act of 1856, and then, no matter how unfounded or malicious the charge may be, escape all responsibility, by standing in the shadow of the officer's name, whom he compelled to act, it would lead to an enormous amount of oppression in the name of the law, and impose upon the county an enormous amount of costs, for the mistakes, if not the malice, of hidden and irresponsible prosecutors.

We are not unmindful of the difficulties which too often attend this class of prosecutions. Witnesses are frequently unwilling to testify, and officers sometimes see but dimly the path of duty which stretches before them. We do not mean to discourage the efforts of law-abiding citizens, to detect and punish these, and all other violations of the law. No class of our people have more interest in the suppression of these excesses than the liquor dealers themselves, for to this class of offenders, they are largely indebted for the reproach which has sometimes been aimed at their business.

We only mean to say, that there is no special and peculiar law governing these cases; that they stand upon the same footing precisely with other prosecutions, except in the language of the act, "cases of felony." And when a jury sees proper to look behind the *nominal* prosecutor, whose name has been perhaps used for the protection it affords, and ascertain and name the *actual* prosecutor, we can see no reason for the interference of the court upon the ground that they have exceeded their power.

Whether they exercise that power wisely and properly is altogether a different question, and one to be determined under the evidence of each particular case. We fully recognize the authority of Guffy *v.* Com., 2 Grant 68, in which Judge Lewis says, "The jury have the power to name the prosecutor; but if they name one against whom there is not a particle of evidence, one who was not the prosecutor, and who had no notice whatever of the proceedings, the injustice would be so monstrous that it seems impossible to doubt in regard to the power and the duty of the court to grant redress." And again, says the same eminent authority, "where the prosecution is not trifling, but one of grave character, where it is not unfounded, but founded upon probable cause existing at the time it was commenced, but afterward fails by the death of material witnesses, and where there is no evidence of malice in the prosecution, it is the duty of the court to set aside the verdict against the prosecutor for the costs."

Tested by these principles, the questions before us are without difficulty. In the case against Ream, there was evidence of a quarrel between defendant and prosecutor, and some evidence tending to show that the prosecution had its origin in the feelings arising from that controversy. The jury evidently took this view of it, and we are not prepared to say they were wrong.

In the case against Meier, there was evidence of disorder in and about the house, although the jury failed to convict of the substantive offence, charged in the indictment. In addition to this there was no evidence of malice on the part of the prosecutor. With probable cause existing for the charge, and only a sense of duty developed in preferring it, it seems to come within the rule of law adopted by the majority of the court in the case above cited. We therefore make the following order:

In Com. *v.* Ream, rule discharged.

In Com. *v.* Meier, rule made absolute.

A KENTUCKY legislator sent up the following memorandum to the clerk: "Leeve is asked to bring in A Bill to altar the time for the Legislater to meat. Referred to the comity on Religen."

COMMON PLEAS.

Keener v. Miller et al.

Judgment—Power of court to amend.

The Court has no power to amend the record of a judgment by striking off the name of one of the defendants, upon application made by him, although said name was written at the bottom of said note by mistake.

Rule to show cause why the record should not be amended as prayed for.

The note upon which the judgment in this case was entered, was written by one Henry Kohr, and was intended as a security for money loaned by Keener to Miller. Under the directions of Kohr, Keener signed his name at the bottom of the note, and thus became one of the defendants in the judgment. He made application to the Court to amend the record by striking off his name as one of the defendants.

E. D. Ziegler for rule.

Blackford & Stewart contra.

December 30, 1881. WICKES, A. L. J. This is an application by the plaintiff to amend the record by striking off his name as a defendant, upon the ground "that his name was written at the bottom of said note by mistake."

The depositions submitted satisfy us that such is the fact, but we think the Court has no power to amend a judgment in this way.

We certainly have no such power unless conferred by statute. The acts of May 2, 1852, and April 12, 1858, (1 Purdon 70) are quite comprehensive in their terms, and are furthermore to be liberally construed, as are all statutes authorizing amendments. But they do not seem to embrace this case. The act of 1852 empowers the court to amend "judgments entered by confession by *changing* or *adding* the name or names of any party plaintiff or defendant, whenever it shall appear to them that a mistake or omission has been made in the name or names of any such party."

A judgment therefore entered by the wrong Christian name may be amended; an error in the amount of the judgment may be amended; and doubtless the name of a party omitted, could be added, and the record thus made to conform to the bond and warrant of attorney.

But I know of no authority to *strike* out the name of a party unless as provided by the statute, "it is necessary to a trial on the merits." (1 Wr. 120; 11 P. F. S. 351.)

It can make no difference that the judgment was entered by confession in this case, the legal consequences would be as if entered on a verdict; 2 Nor. 109. We must therefore discharge the rule to show cause "why the record should not be corrected as prayed for," but upon a proper application will open the judgment and permit the plaintiff to renew his motion to amend.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Apprenticeship—Valid Contract of.—To make a valid contract of apprenticeship in this State, under the Act 29th September, 1770, there must be a binding by indenture, the service must be that of an apprentice, in some art, mystery, occupation or labor, and the contract must have the assent of a parent, guardian or next friend.—*Phelps v. Pittsburgh, Cincinnati & St. Louis Railway Company,* 12 Pittsburgh Legal Journal 171.

Prosecution — Malicious — Probable Cause.—If a prosecutor lays the facts of his case fairly before the District Attorney or a magistrate, and follows the advice given him by commencing a prosecution, he can not be held liable in an action for malicious prosecution, for such advice constitutes probable cause.—*Reardon v. Pierce,* (Chester C. P.) 1 Chester County Reports 323.

YORK LEGAL RECORD.

VOL. II. THURSDAY, Jan. 12, 1882. No. 45.

QUARTER SESSIONS.

Com. v. Mummert.

Criminal Law—Selling Liquor on Sunday—Acts of 1855 *and* 1875.

The act of April 13, 1875, P. L. 40, repeals all former legislation on the same subject, only so far as it supplies the place of such legislation.

The first and third counts of the indictment charged that the defendant "did sell, trade and barter," spirituous and malt liquors on Sunday. The evidence was of actual sale. HELD, That as the act of 1875 prohibited an actual sale of intoxicating drink on Sunday, the act of 1855 was repealed *pro tanto*, and these counts of the indictment could not be sustained.

The second and fourth counts of the indictment charged that the defendant "did allow and permit spirituous and malt liquors to be drank on and within the premises and house so kept by him," &c. HELD, that this was an offence under the act of 1855, which was not prohibited by the act of 1875, and hence these counts must be sustained.

Motion in arrest of judgment, and for a new trial.

The grounds upon which the motion was based are sufficiently set forth in the Court's opinion.

J. L. Ziegler, J. W. Heller and W. C. Chapman for motion.

E. D. Ziegler, E. W. Spangler and H. L. Fisher, contra.

October 18, 1881. WICKES, A. L. J. While we cannot agree that the act of April 12, 1875, (P. L. 40), commonly known as the repeal of the local option law, was intended to repeal all former statutes regulating and restraining the sale of intoxicating liquors in this commonwealth, we think it is quite clear that it has that effect so far as it supplies the place of former legislation upon the same subject.

Such is the uniform current of decision in the lower courts, so far as we are informed, and the Supreme Court (Crouse *v.* Com., 6 Nor. 171), in commenting upon the same act, states the converse of the proposition to be, "that all prior statutes not inconsistent with or supplied by the act of 1875 regulating sales of intoxicating liquors, continue in force, and the whole are to be construed as one." It was manifestly not the purpose of the legislature that the act of 1875 should annul all former statutes, except *pro tanto,* for the 10 Sec. which defines the condition of the bond, distinctly recognizes other laws "of this commonwealth relating to selling or furnishing intoxicating drinks," as continuing in force. The settled principles of construction would seem to forbid any other view. The repeal of statutes by implication is not favored; but when a subsequent affirmative statute introduces a new rule upon a given subject, and is evidently intended as a substitute for a former affirmative statute, it operates to repeal it by implication; 9 Ca. 511; 24 P. F. S. 62. But when a late statute is repugnant to a former one only in part it repeals the former only so far as the repugnancy extends, and leaves all the remainder in force; 9 Barb. 308.

The indictment in this case is drawn under the act of 1855, (2 Purdon 946, pl.38), and charges in the first and third counts, that the defendant "did sell, trade and barter" spirituous and malt liquors on Sunday. The evidence was of *actual* sales, not of trading and bartering. The act of 1875 prohibits an actual sale of "any intoxicating drink on Sunday" prescribing a new and much severer penalty, but leaving in full force the other provisions of the act of 1855. Upon the principles of construction referred to, why is not the act of 1875, so far as it prohibits and punishes such sale, a substitute for that of 1855? Such a construction may require additional care in the preparation of indictments, and the introduction of counts covering the various acts, but however that may be, the defendant when he appears for trial, is entitled to know the specific charges against him and not be convicted under another statute of an offence no longer punishable under it.

But what shall be said of the second and fourth counts of this indictment. They charge that the defendant "did allow and permit spirituous and malt

liquors to be drank on and within, the premises and house so kept by him, &c." This is quite as much an offence under the act of 1855, as to "sell, trade and barter;" but it is not prohibited by the act of 1875. So much then of the former statute remains in force, and we can conceive of no reason why it does not apply to this case.

The evidence was of repeated sales of spirituous and malt liquors on Sunday, by the defendant and members of his family, which he permitted to be "drank on or within the premises or house occupied or kept by him." And the jury returned a general verdict of guilty. How can the defendant escape the consequences of this finding. It is no answer to say that this provision of the act was not intended to cover the case of an actual barter or sale by defendant, but only to apply to persons who had procured liquor elsewhere than on the premises where the same was "permitted to be drank." The offence of selling, trading and bartering is quite complete without drinking upon the premises, the permissive drinking is a distinct offence, and it matters little where the "spiritous or malt liquors" is procured.—We can see no reason why judgment should not be pronounced on the second and fourth counts unless the defendant is entitled to a new trial for the other reasons assigned.

It is said we erred in "permitting evidence to be given to contradict the written license issued by the Court to the defendant and offered in evidence by the Commonwealth itself." We allowed the Clerk of the Court who made out the license to correct a clerical error manifest upon its face, and we are aware of no rule of law which prohibits the introduction of parol evidence for that purpose.

This error when corrected by the clerk, left no doubt that the license was issued for one year instead of for one day, and this disposes of defendant's third reason.

It is further said we allowed evidence to be given of sales prior to the date of the license. We permitted no evidence to go to the jury regarding the sale to any one unless there was evidence that it occurred subsequent to the issuing of the license. There was a conflict of evidence in one or two instances, but we had no power to withdraw it from the jury, and submitted it to them with proper instruction as to the weight it was entitled to at their hands.

It is also said we erred in allowing evidence to be given of a witness getting his bottle filled by one of defendant's sons, when defendant was at church; and on another occasion, evidence that a witness obtained liquor from the spring-house on Sunday, in the absence of defendant.

The facts are not correctly stated; they are as follows: William A. Stambaugh testified, "that he got whiskey on Sunday, within the period covered by the license, from the defendant's son George; that it was furnished him from the bar—defendant not there—that he paid for it the following week to defendant's wife." George Eyster testified, "that during the same period he got a bottle of beer out of the spring-house, on Sunday, on defendant's premises, that defendant was on the porch at the time and could see the spring-house, he said nothing nor did I. I paid his boy ten cents. I drank the beer before defendant and the whole crowd." So that the defendant was not absent when this took place. But it would be odd indeed if a landlord's son could sell liquor from his bar on Sunday, and the landlord's wife receive pay for it during the week, and yet the landlord himself at whose house this was done, escape liability because forsooth he was conveniently absent—attending church it is said. Nor would it be less odd, if he could with equal impunity permit his guests to visit his spring house on Sunday, and there obtain the prohibited liquor, pay his son for it and drink it in his presence, and yet not one word of objection or remonstrance.

Certainly we committed no error in permitting these facts to go to the jury, not only as evidence of illicit sales, but also of the illicit use of liquor on the premises, prohibited by the statute.

We therefore arrest judgment upon the first and third counts of the indictment, discharge the rule for a new trial, and order that the defendant appear for sentence under the second and fourth counts, which are sustained.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Appeal — Recognizance. — An appeal from the judgment of a justice of the peace was entered but no recognizance of bail, one of the defendants claiming the right of appeal without bail on the ground that he was a freeholder. HELD, that the appeal might be perfected in the Common Pleas by the giving of proper security.—*Davis v. Marra,* (Chester C. P.) 1 Chester County Reports 328.

Criminal law — Sunday — Selling segars on.—Where the evidence shows that the place of business was kept open on Sunday and an employee was selling segars, and that the owner was there part of the day, the presumption is that the business was carried on with the latter's knowledge and by his authority, and therefore both the principal and the clerk are guilty.—*Seaman v. Commonwealth,* 38 Legal Intelligencer 479.

Practice—Writ of Error—Effect of.—After a judgment has been removed to the Supreme Court by writ of error, no further proceedings can be had in the Court below, until the record is actually returned thither.—*Courtney v. Beck,* (Schuylkill C. P.) 2 Schuylkill Legal Record 206.

NEW RULES OF COURT.

COMMON PLEAS.

And now to wit, January 9, 1882, it is ordered:

That Rule 1, in the Common Pleas, under the head of "Trial," be amended so as to read as follows:

1. A cause being at issue, either party desiring to have it tried shall so note it in the "watch book" to be kept by the Prothonotary for that purpose, at least four weeks before the commencement of the Court at which it is to be brought forward for trial, and this shall be notice of trial to all parties concerned. But either party who has thus noted the cause for trial may withdraw it by giving the other party or his attorney notice thereof, in writing, three weeks before the first day of such Court, and noting such withdrawal on the "watch book."

That Rule 2, under the same head, be amended so as to read as follows:

2. The Prothonotary shall make out a list of the cases so noted on the "watch book," which shall be arranged on said list according to their seniority, four weeks before the first day of the Court at which they are noted for trial.

That Rule 3, under the same head, be amended so as to read as follows:

3. After reading over the list to ascertain what cases have been continued or are for trial, and to afford an opportunity to move for a continuance or for an attachment, the court will proceed as soon as the current business will permit, to take up the causes and dispose of them in their order, and if, in any cause, unless it be one in which an attachment has been issued, the parties are not ready when the cause is reached, it shall be put to the bottom of the list not to be taken up until all the other causes are disposed of. But no cause shall be continued by consent more than once, and the Prothonotary shall note such continuance on any subsequent Trial List.

That Rule 10, under the same head, be amended so as to read as follows:

10. No case shall be placed upon two consecutive trial lists, for Courts to be holden within three weeks of each other, unless by special order of the Court for cause shown.

RESCINDED.

It is also ordered that the following Rules, under the head of "Attachment," in the Common Pleas, be and the same are hereby rescinded:

4. The Prothonotary shall endorse upon every writ of attachment execution, and upon every writ of *scire facias* against garnishees in foreign attachment, a rule upon the garnishee to file under oath, an answer to the writ, stating whether or not at the time of the service of the attachment upon him, or at any time since, he had in his possession or control any goods, merchandise, moneys, or effects, belonging to the defendant; and if so, the nature, amount and value of the same.

5. If the garnishee fails to make answer as aforesaid, for twenty days after the return day of the writ, judgment in proper form shall be entered against him by the Prothonotary. If an answer be filed and the same is not satisfactory to the plaintiff, he may file interrogatories and enter a rule of course upon the garnishee, to answer the same in twenty days or judgment.

IN EQUITY.

In Equity, the following rule is adopted:

It shall be the duty of the Prothonotary to record all bills and answers in Equity, and he shall be entitled to recover for so doing, the same fees as are allowed by law to the Recorder of Deeds for recording instruments.

COMMON PLEAS AND ORPHANS' COURTS.

In the Common Pleas and Orphans' Courts the following Rules to regulate proceedings before Auditors, Referees and Commissioners are adopted:

Upon every reference to a Referee, Auditor or Commissioner, it shall be his duty as soon as he reasonably can to assign a time and place for proceeding in the cause, giving due notice thereof to the parties or their counsel (except where notice by publication is prescribed by the Rules of Court), and if either party shall fail to appear at the time and place appointed, the Auditor, Referee or Commissioner shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the proceedings to a future day, giving notice to the absent party or his counsel, of such adjournment, and it shall be the duty of the Auditor, Referee or Commissioner, to proceed with all reasonable diligence, and with the least practicable delay; and either party shall be at liberty to apply to the Court or a Judge thereof for an order to the Auditor, Referee or Commissioner to speed the proceedings, and to make his report, and to certify to the Court or Judge the reasons for delay.

Either party to any proceeding before an Auditor, Referee or Commissioner may enter a rule, as of course, on his adversary to close the taking of his testimony within thirty days after notice of such rule; any testimony taken after thirty days notice of such rule, shall not be read on the hearing of said cause either before the Auditor, Referee or Commissioner, or in Court on the hearing of the exceptions.

But it shall be in the discretion of the Court to enlarge the time on the application of the party against whom such order shall have been obtained, upon sufficient cause shown; and no such rule shall be entered against a party, while by the ordinary rules of evidence he is not bound to begin until his adversary has closed.

It is ordered that a copy of each Paper Book prepared for use in the Supreme Court, in any case, civil or criminal, heard and determined in the Courts of this County, shall be filed in the Law Library.

It is further ordered that these rules shall take effect on and after the first day of February, 1882.

By the Court,

PERE L. WICKES.
JOHN GIBSON.

Attest:

W. H. SITLER, Prothonotary.

YORK LEGAL RECORD.

VOL. II. THURSDAY, JAN. 19, 1882. No. 46.

COMMON PLEAS.

C. P. of Chester Co.

Sill v. Rogers.

Where H. by her will gave to S. $1.000 "to be paid by her to her son T. when he shall have attained the age of twenty-one years." HELD, that the interest thereon belonged to S. until T. reached that age.

Per FUTHEY, P. J.—The general rule of law is that where legacies are given, payable at a time specified, they carry no interest before that time.

Where, however, the legatee is a child of the testator or dependent on him, and no other provision is made for his support, the rule is otherwise.

Amicable action and case stated by Ezra D. Sill and Sarah M. Sill, his wife, against Evans Rogers, Trustee of Thomas M. Sill.

The facts sufficiently appear in the opinion of the court.

FUTHEY, P. J. Hannah Marshall by her will made the following bequest: "I give to my niece, Sarah M. Sill, the sum of five hundred dollars and one thousand dollars more, to be paid by her to her son Thomas Marshall Sill when he shall have attained the age of twenty-one years."

The question raised by this record is, how the $1000 mentioned in this bequest is to be enjoyed during the minority of the said Thomas Marshall Sill.

The general rule of law is that where legacies are given, payable at a certain time, as upon the arrival of the legatee of age, they carry no interest before that time, for interest is allowed for delay of payment, and, consequently, till the day of payment comes around, and there is then default, no interest is demandable, unless there is something in the will which shows the testator's intention to give interest in the mean time.

There is an exception to this rule that where the legatee is a child of the testator and a minor, incapable of supporting himself, or one to whom the testator has placed himself *in loco parentis*, and no special provision is made for the maintenance of the legatee, interest will be allowed on the legacy to the child by way of support, although the legacy is not payable until a future time. (Maguffin *v.* Patton, 4 Rawle 119; Seibert's Appeal, 10 Casey 20.) In the case before us, Thos. M. Sill, to whom the legacy is to be paid at twenty-one, is a grand nephew of the testator, and she does not stand towards him in the relation of a parent, or one on whom any obligation rests to provide for his support. On general principles, therefore, he is not entitled to the interest on his legacy during his minority, but simply to the amount of the principal, on his arrival at the age of twenty-one years.

Independently of this, however, the language of the will bears upon its face the proper construction to be given to it. The bequest is "to my niece, Sarah M. Sill, the sum of five hundred dollars and one thousand more, to be paid by her to her son Thomas Marshall Sill when he shall have attained the age of twenty-one years." It is as if the testatrix had said, "I give to my niece $500 to her own, and I give her $1000 more, she to have the use of it until her son arrives at age, when she is to pay it to him."

We think Sarah M. Sill is clearly entitled to the use of this legacy of one thousand dollars during the minority of her son, and direct judgment to be entered on the case stated for the plaintiff for fifty-seven dollars.

Crim. con.—Action for damages for.—The action of *crim. con.* may be brought to recover damages either for seducing the plaintiff's wife, or for alienating her affection from the plaintiff, without seduction. The fact that after a divorce between the plaintiff and his wife, the defendant had intercourse with her, is evidence relevant in connection with facts that occurred before the divorce. If the plaintiff connives, he cannot recover, and his conjugal fidelity during the marriage is to be considered by the jury in arriving at damages.—*Silvernall v. Westerman*, (Mercer C. P.) 11 Luzerne Legal Register 5.

ORPHANS' COURT.

Graham's Estate.

Parent and child—Services of the latter —Meaning of servant—Act of 1834.

A son was employed by his father upon his farm, and the Auditor found that his claim for services so rendered was entitled to a preference. HELD, that a laborer on the farm is not entitled to the preference given to "servants" claims by the Act of February 24, 1834.

Exceptions to Auditor's report.

The facts necessary to a proper understanding of this case are found in the opinion of the Court.

WICKES, A. L. J. The second and fifth exceptions relate to the claim of James C. Graham for one year's wages, and which the auditor has treated as a preferred claim.

In this I think the auditor has erred.

In the first place the presumptions of law are all against the relation of master and servant—the parties were father and son. But conceding that a contract existed between them, and none could be implied in the absence of evidence to establish it, the question is whether the son in the duties he performed, is within the meaning of the word "servant," as employed in the Act of February 24, 1834, defining the order of payment of decedents' debts.

The old Act of 1794, which was identical in this regard, has received elaborate judicial construction, and it has been said that this interpretation has marked out certain plain and intelligible principles for the regulation of these matters, leaving us nothing but the application of these principles to the facts of each case as it arises. I confess the chart of decisions has not so impressed me.

In Ex parte Meason, 5 Binney 167, the leading case in Pennsylvania upon this subject, it was held that the word "servants" entitled to the preference claimed in this case embraces those only who in common parlance are called servants, persons who make part of a man's family and whose business it is to assist in the economy of the family, *or in matters connected with it.* But it was held not to comprehend *workmen* employed at inn works or the like; Tilghman, C. J., and Yeates, J., in their opinions allude to the significant fact that the term "workmen" employed with "servants" in the act of 1705, is omitted in the act of 1794, and they also point to the distinction taken in the old English statutes between servants, laborers, workmen, &c. They also agree, and decide that the term "servants" in the act must be restricted to its common and usual sense as understood by householders.

Judge Tilghman excludes from the list of persons to whom the statute applies, "persons employed in iron works, managers, colliers, wood cutters, wagoners, and those whose business is out of doors," while Judge Yeates embraces in the list, "gardeners, coachmen, footmen, etc., even although they live out of the family." "It signifies," he says, "a hireling, one employed for money to assist in the economy of a family, or in some other matters connected therewith." He further says, he does not count it of moment that the party hired sleeps and eats elsewhere than in the employer's house.

I think one may readily arise from a careful reading of these opinions, without a very clear perception of the scope to be given to the term "servants" in the act.—Brackenridge, J., filed a dissenting opinion in the case, and favored a more liberal construction of the act. While we cannot rely upon his interpretation of the act, as a guide, it is useful nevertheless, as a cotemporaneous comment upon what was meant to be decided by the Court; and it is difficult to escape the conclusion that he understood "laborers at husbandry" servants employed "in agricultural improvements" "servants of husbandry," to be excluded from the benefits of the act.

The subsequent case of Boniface v. Scott, 3 S. & R. 351, decides that a barkeeper is within the meaning of the act, but the case is decided distinctly upon

the ground that he is a domestic living intra *mænia* assisting in the economy of the family, whose sole occupation and employment is about the house; and Gibson, J., who delivers the opinion of the court, sums up the meaning of the word "servant" in the act to be, " all the hirelings employed in service in and about the house, and household affairs, or whose business it is to assist in the economy of the family: the stable boy, the coachman, and all that class of hirelings fall within the reason of the law." In legal phrase they "are menial servants" although by courtesy called "gardener, housekeeper, nurse, coachman or barkeeper." We look in vain in this opinion for any suggestion that laborers upon the farm, are embraced in the meaning of the act.

In the matter of the estate of John Miller, 1 Ashmead 323, it was held that a person hired at a monthly salary, who resided in the house of his employer, and whenever required, assisted in the domestic labors of the family, although principally employed in aiding the intestate, who was a victualler, in the market and slaughterhouse, is a servant and entitled to the preference given by the act; but again is the case distinctly put upon the ground that he "was at the command of his master to be employed at his pleasure, either in the house or elsewhere; "in point of fact," said the learned Judge who decided the case, "he was called upon to assist in domestic labor and when required seems always to have complied with the requisition."

In the case before us the auditor has found that James Graham was employed by his father, the decedent, upon his farm, and we see no reason to question the correctness of the auditor's conclusion, so far as it admits the claim which has been presented against the estate to a *pro rata* distribution.

But we cannot acquiesce in the auditor's conclusion of law that this claim is entitled to be paid as a preferred claim under the provisions of the act already cited.

His duties, as we gather from the evidence, related exclusively to the management and tillage of the farm, he worked in the harvest, ploughed, drove the farm team, delivered the grain, and exercised a general superintendence over the affairs of the farm, for Mr. Thompson testifies that he spoke to Col. Graham about a team to the election, and he was referred to James, with the assurance that whatever he said would be right. But there is not one word in all the evidence to show that he was employed about the house in any of the capacities mentioned in the cases, or that, under his contract with his father, he *could* be called upon to aid in any of the domestic concerns: he lived at home, it is true, but whether because of his contract, or family relation does not appear, and is not perhaps important. But that he was a menial servant, whose sole, or even practical occupation was about the house, or whose business it was to assist in the economy of the family, cannot be argued for a moment from the evidence before us. We think, therefore, that James Graham was not a servant within the meaning of the act, and that his claim cannot be given any preference over the other creditors.

We therefore sustain the exceptions relating to this as a preferred claim, and recommit the report to the Auditor with instructions to make distribution in accordance with the views expressed in this opinion.

O. C. of Delaware County.

Wilson's Estate.

Appointment of insolvent debtor as executor—Right to exemption under act of 1849.

An executor, who was an insolvent debtor of the decedent, is entitled to his exemption, under the act of 1840, on a fi. fa. upon a decree of the Orphans' Court.

Rule to set aside appraisement under exemption law of 1849.

December 5, 1881. CLAYTON, P. J. This proceeding was in the nature of a

fi. fa. upon a decree in the Orphans' Court. The defendant in the execution had been the debtor of the decedent, and she had made him her executor. The Auditor appointed by the court to settle his account as executor of the said Mary Ann Wilson, finds that the balance due the estate was the amount due the decedent for borrowed money, and that it had been lost by misfortunes in business during the lifetime of the decedent. The report also shows that the debt was upon a simple contract with the decedent. This being the case she, if living, could only have recovered a judgment against him for the amount found due the estate by the Auditor. Upon an execution under such a judgment, he could have claimed his exemption under the Act of 1849. Both the Auditor's report and his answer to the affidavit in support of this rule shows his insolvency. He is certainly within the equity of the act of 1849, giving insolvent debtors property to the value of $300, exempt from execution. Garber *v.* Commonwealth, 7 Barr 205, and Piper's Estate, 3 Harris 535, decided that an administrator may discharge his sureties from liability for a debt due by him to his decedent's estate by showing his own insolvency at the time of the decedent's death. It would seem from analogy of reasoning that this defendant should be permitted to show his insolvency, and that the debt for which the execution has issues was and is a liability *ex contractu.*

The rule is discharged.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Affidavit of defence law—What it does not extend to.—A judgment can not be entered for want of an affidavit of defence on a suit on a sheriff's recognizance entered by him and his sureties. The affidavit of defence law does not include actions in tort, nor an action upon a contract which is for an uncertain sum. If the condition of the obligation be for the performance of the duty of a public officer, or of a trustee, or of an agent or clerk, or to secure the delivery of goods, or the rendering of services, it is not within the affidavit of defence law.—*Borlin v. Com. ex rel Hillis,* 39 Legal Intelligencer 12.

Assignment for benefit of creditors—Effect of.—On Dec. 3, 1875, E. P. & E. R. Green drew their promissory note for $600, in favor of Jas. Cloud, payable at the Bank of Brandywine in sixty days. Dec. 28, 1875, the Greens drew another note for $500 in favor of Cloud, who endorsed it and delivered it to the drawers for the purpose of taking up the former note at maturity. It was discounted at the First National Bank of West Chester, and placed to their credit on the books of the bank, where, on Feb. 1, 1876, they had a credit of $900. On Jan. 31, 1875, they drew a check on this bank for $600, stating, in the accompanying letters, that it was in payment of the first note; it was not received by the bank, however, until Feb. 1st, on which day the Greens made an assignment to the plaintiff in trust for creditors. Prior to this time, the Bank of Brandywine had made an assignment also. HELD, that the proceeds of the second note must be applied towards the payment of the first; and that the assignment for creditors operated as a revocation of the order contained in the check and letter, and that the plaintiff was entitled to the balance of the fund. *Brosius v. Cloud et al,* (Chester C. P.) 1 Chester County Reports 333.

Trustee—What constitutes a.—Plaintiff placed money in a lawyer's hands for investment with an understanding or agreement that until he could find a satisfactory mortgage he should pay interest thereon. HELD, that plaintiff could not hold him as a trustee, nor follow his deposit in the bank as trust money.—*Bank of Commerce v. McMurray,* 39 Legal Intelligencer 12.

YORK LEGAL RECORD.

VOL. II. THURSDAY, JAN. 26, 1882. No. 47.

QUARTER SESSIONS.

Com. v. Rauhauser.

Criminal law—Cutting bounded tree.

To complete the offence of maliciously cutting and destroying a certain bounded tree or other allowed land-mark, as described in the 153 section of the Criminal Code, the tree so cut must be *on the line*, must be an undisputed and allowed land-mark, and the cutting must be done maliciously.

Indictment, maliciously cutting bounded tree.

The facts in the case are found in the Court's answers to the defendant's points, and in the charge to the jury.

District Attorney Ziegler, Maish and H. L. Fisher for Commonwealth.

Strine and Chapman for defendant.

The defendant's points and the Court's answers thereto are as follows:

1. That if the jury believe from the evidence that the tree cut by the defendant was not growing *on the line* of lands of the prosecutor, John Neiman, or of Edward Smyser, his vendee, but was, in fact, growing on the defendant's own land, the case is not within the act of assembly on which he stands indicted, and the defendant must be acquitted.

The Court read the first point of the defendant and answered it as follows:

This point is correct.

2. The act of assembly aforesaid embraces cases where the line tree is admitted, allowed and conceded to be a line tree; where the fact of its being a line tree is undisputed, unquestionable, and undoubted: and where the evidence fairly shows, as in this case, that the line and the true boundary of the Neiman lands have been in controversy between the adjoining owners for years, the case is not within the act of assembly and the defendant is entitled to an acquittal.

The Court read the second point of the defendant and answered it as follows:

The tree cut must be an allowed land-mark, which means undisputed, and if the jury believe that evidence fairly shows that the boundary of the Neiman lands has been in controversy between adjoining owners for years, it is not an allowed land-mark within the meaning of the act, and the defendant cannot be convicted.

3. That before the Commonwealth can ask a conviction in this case, they must have shown, not only that the defendant *knew* that the "cut white oak" was in fact a true, certain, line tree, growing *on the line* and marking truly and unquestionably the limit of the adjoining lands, but also that he cut it out of spite and *malice*, in the ordinary sense of that word; that when the words of a statute create an offence, the words are to be understood in their usual ordinary and popular meaning, and not in any mere technical sense; and the fact of malice, in its ordinary meaning, must be proved, like any other element which constitutes the offence; and the Commonwealth having utterly failed to show that this tree was cut *"maliciously"* by the defendant, the defendant is entitled to an acquittal.

The Court read the third point of the defendant and answered it as follows:

This point is correct if the jury believe that the commonwealth has not shown that the defendant cut the tree maliciously.

4. That by the known law of the Commonwealth, the owner of lands is entitled to the last inch next his boundary and to the products growing thereon, as well as to the center of his tract; and if the jury believe that the tree cut was four inches within the defendant's own line, the defendant committed no offence in cutting it, and this prosecution was not only groundless, but a great outrage upon his rights.

The Court read the fourth point of the defendant and answered it as follows:

This point goes beyond what the Court is required to answer to a legal proposition; but we affirm the proposition that

the owner of lands is entitled to use of them to his boundary line, and if the jury believe that the tree cut was four inches within the defendant's line, he was not guilty of any offence within meaning of the act of Assembly.

The Court, GIBSON, A. L. J., charged the jury as follows:

The defendant, Gideon Rauhauser, is on his trial before you, for the offence named in the one hundred and fifty-third section of the criminal code of 1860; for knowingly and maliciously cutting a certain bounded tree to the wrong of his neighbor, John Neiman, or Edward Smyser, an alienee of Neiman. The offence as defined by the Legislature is by no means so clear as to indicate at once what will constitute it. Yet it plainly indicates what the jury is to pass upon.

The first question is whether or not the defendant cut the tree? This is proved by his confession, and indeed by his admission upon the stand that he cut it down and made it into a beam for a cider press.

Secondly, was the tree what is meant by the Act as a bounded tree? Bounded means limited. To bound means to limit, to terminate, to make to bound. A bounded tree is, therefore, a tree marked for the purpose of fixing the bounds of land.—The Act after using the words, "a certain bounded tree," further says, "or other allowed landmark." Was the tree in question then, a landmark? A tree or a corner of a survey would be a landmark. But is any tree along a line marked by surveyors, forever to remain as a landmark, in addition to corners being fixed? For as the Act says—any certain bounded tree or allowed landmark—the jury is to determine whether this tree was such or not.

The line which this tree is alleged to mark, is well established, by corners, by trees, by fences, stone and rail, for a great length of time. There is woodland on one side and partially woodland on the other. We can understand how on a long line running through woodland, trees may here and there be marked, to prevent the woodchoppers on either side from trespassing on the other. But in this case, the line, whether it be the true line or not between these parties, is well defined. Yet the principal issue on the trial has been, whether it is the correct line or not, the defendant contending that it is not. The Commonwealth produced in evidence deeds and surveys, &c., in order to prove the location on the ground, the testimony of neighbors and surveyors as to the marks on the ground recognized as such, among which this white oak tree was one. The defendant produced old papers, and a connected survey of original warrants and patents from the Department of the Interior, and testimony of surveyors, as to ancient marks on the ground, other than those proved by the Commonwealth, alleging in the original papers a mistake of twenty perches in a certain line, fifty-six perches instead of thirty-six. But a survey made by Mr. Beaton Smith, shows that lines on such a basis would throw in confusion all the surrounding lands—would go through cultivated fields and curtilages. Though it is a question for you to determine, there seems to be no doubt of the line proved by the Commonwealth.

But allowing this line, the defendant claims that the tree cut was on his own ground. Now the Act of Assembly not only requires that it should be a bounded tree, an allowed landmark, but it goes further and says, "to the wrong of his neighbor or any other person."

How can that be if the tree is on the defendant's own land? Along this line there are several marked trees—and where the cut tree was, there were three, including this one, within one hundred yards of each other, and the nearest one is about twenty steps from it. According to a line run by Mr. Smith, from a black oak and a chestnut oak, two of these three marked trees, this white oak was thrown four inches on the defend-

ant's land. Mr. Ettinger said in his testimony, that he could not say from recollection whether the line struck the white oak or not. Even if the tree in question was actually on the line, whether under the circumstances, it was or was not a bounded tree, in the meaning of the Act of Assembly, would be a question for the jury; but if you find that the tree was upon the defendant's own ground then there can be no offence within the meaning of the Act. The Legislature, itself, cannot deprive a man of his own property. In the case of railroads or common roads, where land is taken with what is growing on them, there is always compensation given, and in the case of party walls in towns, where one is allowed to go over a few inches on the ground of his neighbor, there is supposed to be a mutual compensation. At any rate it is old law, as old as incorporate towns. But where for convenience of surveyors, or an adjoining owner even, except where perhaps, a mutual agreement between adjoining owners had long since been made and was proved, a tree near the line has been marked, there is no law to deprive a man of his property in the marked tree. If the tree is on the line, to cut it down would be a trespass by reason of the joint ownership and even then in order to make the cutting a wrong to the neighbor it ought to be a necessary landmark. But again, the question you are to decide is not only whether it is to the wrong of the neighbor; the act goes further—the cutting must be maliciously done. Knowingly and maliciously—that is, with full knowledge that the tree is a landmark and with the intention to do the injury. Its being maliciously done is what constitutes the offence. We have no means of defining malice, except by the law of malicious mischief. The compilers of the criminal code classify the offence here charged under the head of malicious mischief. Under the head of this offence in Wharton's Criminal Law, it is said that a mere wanton injury, an injury done in anger, will not constitute the offence. The malice that will make an injury to property malicious mischief can be comprehended rather than defined. There must be some circumstances of malice shown, except where an act is of such a character as that from it malice can be inferred. Here, however, if the defendant thought he had a right, even if mistaken, to cut and use the tree, the act would not be malicious. In order to complete the offence, you must find the tree cut to have been a certain bounded tree, an allowed landmark, put there for the purpose of defining a boundary, that it was at least on the line, and the removal of which was a wrong to the prosecutor, or other person named in the indictment, and that it was done maliciously with malice against the neighbor, that is, with the intention of injuring the neighbor, and for no other purpose. In case you find the defendant not guilty, you will say whether the county, or the prosecutor, or the defendant shall pay the costs, or whether the same shall be divided between the prosecutor and the defendant in such proportions as you shall think proper.

COMMON PLEAS.

C. P. of Luzerne Co.

Walsh v. Dillon.

Opening judgment—Evidence—Practice.

1. On a rule to open a judgment the defendant was the only witness, and he swore that the plaintiff was dead. HELD, that he was incompetent, though the plaintiff's death had not been suggested of record. It was his duty to have suggested the death.

2. In a proceeding to open a judgment, the defendant is the moving party, and he cannot take advantage of his own default in not suggesting the plaintiff's death.

Rule to open judgment, and let defendant into a defence.

RICE, P. J. If the defendant, James Dillon, is a competent witness, then his uncontradicted testimony that he did not sign this judgment note, nor authorize any one else to sign for him, and that he owes nothing to the plaintiff on this ac-

count, would be sufficient to warrant the granting of his present application. But by his own testimony it appears that Frank Walsh, the plaintiff, has been dead about four years. Then death has closed the mouth of the plaintiff, and, therefore, out of regard for the plainest principles of natural justice the law closes the mouth of the defendant. It is said, however, that there is no record proof of the plaintiff's death, but we fail to see how this helps the defendant's case. It being the fact, as sworn to by himself, it was his duty to suggest it of record. It is to be borne in mind that the defendant is the moving party in an application of this kind. It is he who invokes the action of the court, and not the plaintiff; therefore the duty is imposed on him of putting the record in such shape that his application for relief may be granted. If he does not, then he is in default. This is too often overlooked in cases of this kind. This disposes of the objection that there is no record proof of the plaintiff's death. It amounts to this, that the defendant cannot take advantage of his own default. He might as well ask us to enter a judgment against a dead man on his own testimony, and without substituting of record by proper process the representatives of the deceased. In any view of the case, we think this rule must be discharged. At first glance this seems like a hardship, but if so, it is no greater than would be the injustice of permitting him to testify for his own benefit when the plaintiff cannot. In this particular case, however, there can be no great hardship. By the defendant's testimony it appears that the subscribing witness is living within the county. It is not alleged that he was a party to any forgery, and it would have at least shown due diligence if he had been called and sworn as to his knowledge and recollection of the matter. But if the defendant is the only witness who can establish his defence, hard as the refusal of his application may seem, it would do him no good to open the judgment and direct an issue, upon the trial of which he would be in no better plight than he is now.

The rule is discharged.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Judgment—Lien of—Purchase Money.—Two judgments were entered on the same day. One only stated on its face that it was to secure the purchase money of the property transferred: *Held,* that the holder of the other judgment could also come in equally with the purchase money judgment if it could be shown that the records gave notice to the assignee of the purchase money judgment that the other judgment was also for purchase money.—*Cohen's Appeal,* 11 Luzerne Legal Register 13.

Will — When doubtful expressions must be construed in favor of heir—Charitable use.—Testator left his real estate in trust for his daughter, after which the will contained the following clause: "I give and bequeath to my said daughter all the personal property that may be upon or belonging to said real estate. The existence of the said trust not to interfere with the conveyance of said real estate by will of my said daughter if she should desire it except she should die under age and unmarried in which case I leave said estate to my executors for distribution for charitable uses as well as all the residue or remainder of my estate after the legacies herein named shall be paid, hoping they may distribute it so as to do the most good it is capable of whether the use should be strictly charitable or not." *Held,* The words "as well as" in the foregoing clause, are conjunctive, and make the devise of the residue to the executors, subject to the conditions of the preceding sentence, that the daughter should die under age and unmarried. Should she attain full age or marry under age, the residue will vest absolutely in her.—*Sharpless' Estate,* (Delaware O. C.) 1 Weekly Reporter 175.

YORK LEGAL RECORD.

VOL. II. THURSDAY, FEB. 2, 1882. No. 48.

ORPHANS' COURT.

Venus' Estate.

Decedent's Estate — Widow's Exemptions—Laches in Making—Subsequent Marriage—Evidence.

Where the widow of a decedent claims her $300 exemption in money, when there is no money belonging to the estate; declines to return any of the personalty and refuses an appraisement of it, she can not wait until the personal property is sold and turned into cash and then apply for her $300 out of the proceeds.

A widow's right to claim $300 exemption is not ousted by her subsequent marriage.

An administrator is a competent witness to prove the widow's notice of her exemption claim, where his only interest in the estate is compensation for services rendered.

Where a verbal ante-nuptial contract was entered into by A. and B., by which it was agreed "that in the case of the death of either, the property of the one so dying should go to his or her heirs, free from any claim by the survivor B., upon the death of A., cannot claim her $300 exemption."

In a contract between the widow and the children of a decedent, as to her right to claim the $300 exemption, both parties are competent to testify to facts occurring in the lifetime of the decedent.

The following extracts from the report of the Auditor (Jas. W. Latimer, Esq.) contain the substance of the questions of law and fact involved in this controversy:

The only contention before your auditor was as to the right of the widow to participate in this distribution. She claimed three hundred dollars in money out of the balance in this account under the act of Assembly, approved April 14, 1851, (Purdon vol. 1, p. 416), and its supplements; and she also claimed one-third of the balance on the account after deducting said $300 (if the same should be allowed to her).

For the children and heirs it was contended that by a parol ante-nuptial contract between decedent and this widow (his second wife), which was not reduced to writing, it was mutually agreed between them that in case of the death of the husband, leaving the wife to survive, his property should go to his heirs, free from any claim by her; and that in case of her death, leaving the husband to survive, her property should go to her heirs free from any claim by him. And further that the widow's claim to the $300 was not made at the proper time nor in the proper manner; that there being no money, belonging to decedent at the time of his death, and the widow not having demanded an appraisement of personalty, selected to be retained by her, she could not demand her exemption in money the proceeds of personalty sold by the administrators. And further that even if the claim to the $300 had been made at the proper time and in the proper manner, this alleged ante-nuptial contract estopped her from making any claims under the act of Assembly above referred to.

First as to the $300 claim. The auditor is of the opinion that the widow's claim to $300 in money, out of the balance on this account, cannot be sustained. The evidence is that prior to the appraisement she "gave a written notice, now mislaid, to the administrators that she desired $300 in money out of the estate;" that at the time of the appraisement she was asked if she desired to take $300 out of personal estate; that she replied that she wanted her $300 in money; that she then explicitly refused to take any of the personalty; did not demand an appraisement of either realty or personalty; and that there was no money belonging to the decedent in hand. That just prior to this distribution she served to the administrators a written notice of her claim offered in evidence and make "A." J. W .L.

"The law seems to contemplate a retention by the widow or children of property belonging to the decedent at his death, and appraisement of it by the appraisers of the decedent's personalty. But it must be of something owned by the decedent at his death; Witmer's Appeal, 2 Pearson 473.

She can demand it in money or notes if there be such, and there need be no appraisement, but if there be money or notes, and she desires the exemption in personalty, she must claim the specific

articles and demand an appraisement of them, and there is no provision, in the act of Assembly on which her claim is based, for a demand by her of the proceeds of sale of personal estate sold by the administrators in the ordinary course of administration. These conclusions are questioned by Witmer's Appeal, supra; Davis' Appeal, 10 Casey 256; Baskin's Appeal, 2 Wright 65; Hufman's Appeal, 31 Smith 329; Seller's Estate, 1 Norris 153. They are unshaken by Kirkpatrick's Estate, 5 Phila. 98, or Larrison's Appeal, 12 Casey 130; which simply decide that no appraisement is necessary where the claim is made out of money in hand or securities in hand at the time.

Spencer's Appeal, 3 Casey 218; Hildebrand's Appeal, 3 Wright 133, and Nottes' Appeal, 9 Wright 361, cited by the counsel for the widow, turned on other questions, and the reports do not show whether or not in these cases an appraisement was demanded by the widow, though it is a fair inference from the opinion in Hildebrand's Appeal that the proceedings were so far regular (See 1st paragraph of p. 135).

Having declined to retain any of the personalty, having refused an appraisement of it, having claimed her exemption in money, and the evidence being that there was no money on hand belonging to the decedent at his death, the auditor is of the opinion that the widow can not claim, in this distribution, $300 proceeds of personalty sold by the administrators in the ordinary course of administration. This conclusion is independent of the alleged ante-nuptial contract.

It the decedent and Miss Webb made an ante-nuptial contract by which it was agreed that at his death, she surviving should receive no part of his estate; and at her death he surviving should receive no part of her estate (as alleged by the children), the effect of such an ante-nuptial agreement would be to deprive her of any right under the exemption laws; Tierman *v.* Tierman's Executors, 37 Leg. Int. 184; same case reported under name of Tierman *v.* Binns, 11 Norris 248.

Second. Was there such an ante-nuptial agreement?

As preliminary, to the proper discussion of this question, it is necessary to determine the questions raised as to the competency of certain witnesses called on either side; and the admissibility of a considerable portion of the evidence offered to establish or refute the alleged ante-nuptial contract.

To prove the existence of the alleged contract two of the decedent's daughters claimants in this distribution, and two sons, who were also administrators and claimants, and the husband of a daughter, a claimant, were called and testified to matters occurring in life time. To disprove its existence, Mrs. Hunt, the widow of the intestate, claiming against the alleged contract, was called and testified to matters occurring in life time.

On behalf of the children it was contended that as they were not claiming as creditors, were not seeking to charge the estate with any debt or liability incurred in the life time, they were within the exception of the proviso of the 1st section of the act of 15th of April, 1869, and were competent witnesses to testify to matters occurring in the life time. But that the widow was seeking to charge the estate; occupied the position of a creditor of the estate, seeking to set aside a contract of the intestate made in his life time, and therefore incompetent.

On behalf of the widow it was contended that she was not seeking to charge the estate as a creditor, but that she occupied the same position as the children, viz: that of a party on whom a portion of the right of the deceased owner had devolved by operation of law at his death; that if the children were competent she was competent, the nature and character of her interest in the event of proceeding being the same as theirs. But

it was earnestly insisted that the children were not competent. After a careful consideration of all the authorities your auditor has come to the conclusion that the children and the widow are all alike competent witnesses to testify to facts occurring in the life time of intestate.

Since the act of April 15, 1869, all witnesses are *prima facie* competent so far as interest or policy is concerned; McClelland *v.* West, 20 Smith 185. "Parties claiming under the same decedent by the mere operation of law devolving the estate upon them, as by descent or succession, are exempted from the prohibition of the proviso, in contrast to those who stand in adverse relation by reason of a subject of contract, one side of which has come from one of the original parties to the disputed subject;" Karns *v.* Tanner, 16 Smith 297-306.

The last clause of the above quotation from the opinion in Karns *v.* Tanner just cited, may seem to militate against the conclusion of your auditor, but it is sustained by subsequent cases.

"This is an issue between parties claiming a right by evolution on the death of a former owner. The subject matter is respecting the right so required. Thus the form of the suit, the subject matter, and the parties then to bring it within the exception. It follows that both parties claiming an estate, under the same decedent, which has devolved on them by descent or succession are competent witnesses in the trial of an issue to settle their respective rights thereto;" citing Karns *v.* Tanner, supra; Bowen *v.* Goranflo, 23 Smith 357.

Were the widow or children claiming as creditors they would all be alike incompetent to testify to matters occurring in the intestate's lifetime; Hoopes *v.* Beale, 9 Norris 82; Taylor *v.* Kelly, 30 Smith 95; McBride's Appeal, 22 Smith 480; Gyger's Appeal, 24 Smith 48.

Claiming, as they all do, by evolution on the death of the former owner, they are all within the execption to the proviso of the 1st section of the act of April 15th, 1869, and all alike competent.

[The auditor, after reviewing the evidence on this subject, comes to the following conclusions.]

Your auditor is of the opinion that the weight of evidence is in favor of the alleged ante-nuptial contract. He therefore finds that prior to their marriage and in contemplation and consideration of it, this intestate and his intended wife, Miss Euphemia D. Webb, entered into a contract, by which it was agreed that in case of the death of either the property of the one dying should go to his or her heirs free from any claim by the survivor; that the widow is bound by her agreement, and estopped by it from claiming any part of intestate's estate in this distribution, and he has, therefore, distributed the balance on this account (after deducting costs of audit and the only debt proved) among the children of intestate share and share alike.

To this finding the claimant filed exceptions.

Geo. W. McElroy and Cochran & Hay for exceptions.

Blackford & Stewart, contra.

January 9, 1882. WICKES, P. J. We have looked carefully through the auditor's report, the evidence filed by him, and the authorities upon which he relies, and we do not think that any one of the numerous exceptions filed can be sustained.

Apart from the ante-nuptial contract found by the auditor, the widow of the decedent waived her right to $300 out of his estate, she claimed it in money, when there was no money belonging to the estate, she declined to retain any of the personalty and refused any appraisement of it, and not until the expenses of a full administration had been incurred and the personal property converted into

cash, did she prefer a claim of $300 of the proceeds of sale. These were sufficient reasons, under the authorities cited by the auditor, for refusing her claim.

In addition to these reasons for rejecting it, it was urged at the argument that she had contracted another marriage at the time she gave notice of her claim, and the case of Burk *v.* Gleason, 10 Wr. 297; was cited in support of the proposition that by reason of such marriage she was no longer the *widow* of the decedent within the spirit and meaning of the act of April 14, 1851, (Purd. 281). The language of the Judge who delivered the opinion of the Court in that case certainly points in the direction of such a doctrine, although the decision proceeded rather upon the *laches* of the widow than the effect of a second marriage upon her claim. But had the learned counsel who cited that case followed through subsequent decisions, he would have found its authority upon this point very seriously shaken. In Com. *v.* Powell, 1 P. F. S. 441, Mr. Justice Thompson, who by the way dissented from the opinion in Burk *v.* Gleason, takes occasion to say that "by the intestate laws of the State the interest of a widow is fixed the moment she becomes a widow, and is not divested by a subsequent marriage." In Shumate *v.* McGarity, 2 Norris 39, Gordon, Justice, in speaking of Burk *v.* Gleason says, "we are very much inclined to doubt the soundness of the conclusion at which the Court arrived in that case. The question was one of jurisdiction in the Orphans' Court, and we cannot see how mere lapse of time, could oust that jurisdiction in the case of a widow's allowance, any more than for like cause, the jurisdiction of the Common Pleas, could be ousted in an action of ejectment." We think therefore, that if neither the subsequent marriage of a widow can deprive her of rights which attach at the moment and by reason of her widowhood, nor her laches operate to oust the jurisdiction of the Orphans' Court, the union of the two, each in itself harmless, can scarcely produce the effect which Burk *v.* Gleason would seem to indicate. It is also said the administrator, Cornelius Webb, was not a competent witness to prove the widow's notice of her exemption claim, and the case of Guldin's Administrator *v.* Guldin, 10 W. N. C. 395, is cited as sustaining the objection. But we think the auditor committed no error in this regard, for in the first place no objection was made to the competency of the witness at the time he was offered and examined, and in the second place it does not appear that he had the slightest interest in the subject matter of this controversy, except his compensation for services out of the estate.

The ante-nuptial contract found by the auditor, would also operate to deprive her of the $300 she claims; Tierman *v.* Binns, 11 Nor. 148, but the reasons assigned by the auditor, apart from the parol agreement of the parties before marriage, are quite sufficient to settle this question adversely to the claim of the widow.

We come now to consider the ante-nuptial contract. That such a parol agreement may be entered into, and effect given to it after the marriage is abundantly shown by Gackenbach *v.* Bronse, 4 W. & S. 546, and Lants' Appeal, 1 YORK LEGAL RECORD 143. The consideration of marriage has been often held to be a valuable one, and besides which the widow at the time she entered into the agreement, was possessd of a separate estate, her control of which, she evidently desired should not be changed by the marriage. The section of the Statute of Fraud, which requires agreements or treaties entered into upon consideration of marriage, to be in writing, was never incorporated into the laws of the State, nor does the act of 1872, embrace such a provision.

But if the principle of law existed, a Court of equity could and would take a

case out of the Statute, where there was such part performance, as ought to estop the parties or either of them from denying the contract; for the rule is that where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed. The marriage of the parties was the fact performed in this case, in addition to which the evidence shows that the widow controlled her separate estate during her coverture, and could unquestionably have disposed of it by will had she died before her husband.

Nor do the intestate laws conflict with such a settlement as was here made, for said the Court in 4 W. & S. 545, "the provision of the intestate law was not designed for a case where the course of the property at the wife's death was marked out by a settlement."

We have carefully examined the auditor's rulings upon the competency of witnesses and the admissions of evidence, in the light of the objections to both, urged at the argument, and we find no error, certainly none of which the widow can complain, nor do we discover any error in the finding of fact, that such a contract as was alleged really existed, viz., "that in case of the death of either, the property of the one so dying should go to his or her heirs free from any claim by the survivor."

It is true she denies that such a contract was ever entered into by her and the intestate prior to their marriage, but the auditor has found in favor of its existence, and in so finding has not committed such plain error as would justify us in setting it aside. Why then should the contract not prevail; we must look to that only, and if it operates to bar her rights under the intestate laws, it is only because she agreed it should have that effect, in consideration not only of marriage, but of equal advantages which she expected to derive from it.

How far such a parol agreement will operate to bar her right of dower in the decedent's real estate, is a question now pending before us, and which for the moment we do not decide, but certainly the chattels of both are embraced in the terms of the decision in Gackenbrach *v.* Bronse, and the language of the Court in Lants' Appeal, seems broad enough to include her dower interest.

Exceptions to the report of auditor dismissed, and the report confirmed.

COMMON PLEAS.

C. P. of Allegheny Co.

Weiterhausen v. Shaner et al.

Promissory Note—Endorsement—Laches.

A. handed to B., the cashier of a banking partnership, after banking hours and on a public street, a note drawn by C., who was insolvent to the order of D., and D., who was solvent, indorsed in blank, with instructions to collect it. B. took the note, and when it matured placed it to the account of D., as though he was the owner. In an action by A. against the partnership, *held*, that they were liable for the neglect of the cashier to make demand of the maker and give notice of non-payment to the indorser.

Questions of law reserved. The opinion states the facts:

December 8, 1881. STOWE, P. J., The evidence in this case showed that the defendants were a banking firm, doing business in Allegheny City, and as part of the business received deposits and took notes for collection, and that it was their duty in collecting notes to make demand upon the makers at maturity, and in case of non-payment, protest the notes and give due notice thereof to the indorsers. The plaintiff was a depositor and had an account with the bank. Shaner was the cashier and active business agent of the defendant's bank, and also a partner. About April 1, 1878, while Shaner was holding this relation to defendants and the bank, the plaintiff met him upon the street, some square or more from the place where the bank carried on its business, after its regular business hours, say between 5 and 6 o'clock p. m. (the bank closing at 4 o'clock), and handed him a note, made by F. Staumpf to the order of Charles Kellner, and by him in-

dorsed in blank for $200, dated January 30, 1878, and payable in ninety days, stating that he wished it collected. Shaner took the note and marked the letter "C" on it. He received it for collection on account of the bank and as cashier, and not as a personal matter. The evidence also shows that he put the note in his pocket-book and forgot it for some time, when afterwards seeing it, he took it and placed it to the credit of the indorser, Kellner, as though he was the owner, and failed to give notice of non-payment. The maker was and still is utterly insolvent, and Kellner, the indorser, was and still is able to pay, but being released from liability by reason of the want of protest and notice, has not and will not pay the note.

The defendants not controverting any of these matters, alleged at the trial that the defendants were not liable, because the defendant's bank had a regular banking-house and place of business and was governed by the ordinary rules in relation to doing business by banks. That this transaction was not done at the bank nor within their regular banking hours, and generally that the cashier exceeded his authority in receiving a note to collect under the circumstances, and that, therefore, defendants were not liable for his mistake and negligence by which the plaintiff lost his money.

Upon this theory the court was asked to charge the jury that,

First. The note in question having been given Shaner, one of the defendants, in the street, after banking hours, without any special instruction except to collect it, his acceptance would not bind the defendants.

Second. The delivery of said note to Shaner on the street, after banking hours, without anything on the paper to indicate ownership, was such negligence on part of plaintiff as will prevent him recovering against defendants.

These points were refused *pro tempore* and the jury directed to find a verdict for plaintiff, subject to the questions of law thus raised.

The whole matter depends upon the power of Shaner, the cashier and partner, to bind his fellow-partners and the firm by receiving a note for collection from a customer of the bank, after banking hours, and upon the street, at a distance from the bank.

If this were the case of a corporation, or if Shaner were not a partner, I have no doubt in the absence of proof of a custom to the contrary, that such an act would not bind the defendants because it would clearly be an excess of authority on the part of the cashier. But this was an ordinary banking partnership in which Shaner and the defendants were ordinary partners, and by that very relation were authorized to act for each other, and for the firm in relation to whatever pertained to carrying on the business of the bank to the fullest extent. Whatever properly fell within the partnership business, one could do, just as well as all together, and particularly so when, as in this case, that one was the general business manager.

So far is this principle carried that a firm will be bound by the frauds committed by one partner in the course of the partnership business, even when the other partners have not the slightest connection with or knowledge of, or participation in the fraud, for by forming the connection of partnership the partners declare to the world that they are satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns: Story on Partnership, §108.

Judgment is now directed to be entered upon the verdict in favor of the plaintiff and against defendants upon payment of the verdict fee.

YORK LEGAL RECORD.

VOL. II. THURSDAY, FEB. 16, 1882. NOS. 49-50.

OYER AND TERMINER.

Com. v. John Coyle Jr.

Criminal Law — Insanity — Kinds of — Tests of — Excitement — Expressions by jurors.

When partial insanity is alleged, the test is the prisoner's belief in the real existence of facts which are entirely imaginary, but which if true would be a good defence.

When homicidal mania is the prisoner's plea, he should establish by clear evidence an irresistible inclination to kill, and that he was utterly unable to control his will, or subjugate his intellect, and that he was not actuated by anger, jealousy, revenge and kindred evil passions.

If the evidence leaves the mind of the jury in doubt as to the insanity it will not justify an acquittal.

When general insanity is set up as a defense, the test of it is the power or capacity of the prisoner to distinguish between right and wrong in reference to the particular act in question.

The evidence of it (insanity) must be satisfactory, not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature.

Even if the jury believe the prisoner really intended to take his own life, this would not be of itself evidence of insanity. It would only be a circumstance in the case to be considered by them in connection with other facts and circumstances for the purpose of enabling them to determine the mental condition of the prisoner.

It is no ground for a new trial that a juror, examined upon his *voir dire*, made use of the expression "I say hang him"; such juror being challenged for cause and the challenge sustained.

The fact that the public mind was greatly excited upon the subject of the murder, by public rumors and newspaper discussion, is no ground for a new trial.

Motion for a new trial.

The defendant was tried and convicted of the murder of Emily Myers, on the 30th of May, 1881. The only defence made was that of insanity. The Court (WICKES, A. L. J.) charged the jury as follows:

GENTLEMEN OF THE JURY.—Without pausing to dwell upon the very serious character in which you and I are engaged, for that has been sufficiently impressed upon you already, I shall proceed to address you as clearly and briefly as possible upon what I conceive to be the necessary questions of law arising in this case, and in regard to which you are entitled to instruction from the court, that you may intelligently apply them to the facts, which are more especially for your determination.

The eloquent gentlemen who have spoken to you on behalf of the commonwealth and in defence of the prisoner, "have sounded every shoal and depth" of the case from their respective standpoints; they have carefully analyzed the evidence, brought to the foreground like skillful artists the facts they considered, and desire you should consider most important, and perhaps left in the shadow other facts not so essential to their respective views, but altogether the result has been that the evidence produced on both sides has been thoroughly canvassed—its contradictions pointed out—its weak points exposed—and by elaborate presentations passed so thoroughly in review before you that I can but feel that the only remaining duty devolving upon the court is to direct your attention to the prinicples of law, which you are to bear in mind in considering this evidence and in arriving at your verdict upon it.

Let us then first consider the law as it defines the crime charged in the indictment and the measure of proof necessary to sustain it, and secondly the law as it relates to the ground of the prisoner's defence—namely—mental unsoundness, and consider the degree and extent required by law to relieve a man from criminal responsibility, and the measure of proof necessary to establish it.

The crime charged in the indictment against the prisoner at the bar, is willful, deliberate and premeditated murder. What is the law of this crime? It is described to be at common law, which forms as you are perhaps aware the foundation of our own system of laws, "when a person of sound memory and discretion unlawfully kills any reasonable creature in being under the peace of the commonwealth, with malice aforethought, expressed or implied." At common law all homicide was presumed to be malicious and therefore amounting to

murder, until the contrary was made to appear from circumstances of alleviation, excuse or justification; and it was incumbent upon the prisoner to make out such circumstances to the satisfaction of the Court and Jury, unless they arose out of the evidence produced against him.

In Pennsylvania by the act of 31 March, 1860, commonly known as the crimes act, the legislature following our old statute of 1794, which recognized degrees of murder, enacted that "A murder which shall be perpetrated by means of poison or by lying in wait, *or by any other kind of willful, deliberate and premeditated killing,* or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, as certain in their verdict whether it be murder of the first or second degree."

It is not alleged that the murder charged in this case, was done by means of poison or lying in wait or in the commission of either of the felonies enumerated in the act. But it is with willful, deliberate and premeditated killing, that the indictment challenges our attention.

When a homicide is committed in Pennsylvania, the presumption arises no higher than murder in the second degree, and if the commonwealth seeks to convict of the higher degree, it must satisfy the jury that the killing was willful, deliberate and premeditated. If the prisoner desires to reduce the grade of the offence to manslaughter, the duty is upon him to show such facts, and circumstances as will overcome the legal presumption.

I note these distinctions between the common law and the statute, that you may clearly comprehend what we are about to say.

The Commonwealth in the case before us, charges murder of the first degree.—They must therefore satisfy you not only that a homicide has been committed, but that it was done with malice aforethought, expressed or implied by law.

Malice in its proper legal sense is different from that which it bears in common speech.

In its ordinary acceptation, it signifies a desire of revenge, or a settled anger against a particular person—but this is not its legal sense. As employed in the criminal law, it comprehends not only a particular ill will, but every case in which there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured.

Again it may either be expressed or implied. Express malice exists when the party evinces an intention to kill, which may be gathered from his threats and declarations.

Implied malice is that which the law infers from the facts proved in a particular case, and is implied by the law from any deliberate cruel act committed by one person against another. From these explanations you will observe the meaning to be attached to the common law expression, "malice aforethought expressed or implied," and you will bear in mind that the same meaning is signified by the language of our statute when it describes "any other kind of deliberate and premeditated killing."

Murder in the second degree, includes all unlawful killing, under circumstances evincing depravity of heart, recklessness of purpose "and a disposition of mind regardless of social duty" but when no intent to kill can reasonably and fully be inferred from the conduct of the accused.

Manslaughter is the unlawful killing of another without malice expressed or implied; "it is homicide;" said a distinguished jurist, "not under the influence of malice, but where the blood is heated by provocation and before it has time to cool."

Notwithstanding the fact that one of the learned counsel for the prisoner has said to you that "this is murder in the first degree or no murder at all" it is my duty to mention these various grades into which homicide may be resolved, because you are the judges of the law as well as of the fact and can apply the law to the facts, as you may see proper.

In my opinion, however, we have to deal in this case, only with that kind of murder in the first degree which is described as willful, deliberate and premeditated.

Said Mr. Justice Agnew in commenting upon this language, "Many cases have been decided under this clause in all of which it has been held that the *intention* to kill is the essence of the offence, therefore if an intention exists it is *willful;* if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design it is *deliberate;* and if sufficient time be afforded to enable the mind fully to form the design to kill, and select the instrument, or to frame the plan to carry this design into execution, it is *premeditated.* The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in evidence. The intent to kill like the malice to which we have already referred, may also be gathered from the expressions of the accused —his threats and declarations, or it may be inferred from his acts and conduct. The rule of law is that a man shall be taken to intend that which he does, or which is the immediate and necessary consequence of his acts. A mortal wound given with a deadly weapon, previously in the hands of the slayer, without any or upon very slight provocation is, *prima facie,* willful, deliberate and premeditated killing. Has such *prima facie* case been made out by the commonwealth.

It has proved to you that on the morning of the 30th of May last, and within the jurisdiction of this Court, a young girl was living as a domestic in the family of the prisoner's mother. That at an early hour, perhaps five o'clock, she was called and after making her simple toilet she proceeded in full health to the stable in obedience to the instructions given her, and shortly afterwards Mrs. Coyle heard three sounds, "like the striking of an axe on a board." That she proceeded to the porch and called "Emily," but received no answer, and that the prisoner who was a member of her family at the time, came down stairs and told her, she needn't call Emily, that "she was dead;" that she had promised to marry him, and he had gone to the stable to see if she would be as good as her word, and that she had said, she wouldn't marry him or any other man, and that he then shot her and himself. The mother than alarmed her husband who immediately ran to the barn, and there found the body of the slain girl, lying near the door. He proceeded to gather his neighbors together, the authorities were notified. and an inquest held. Lying beside the body of the deceased, was a pistol, which has been produced in Court, the cylinder of which contained only one undischarged cartridge. The subsequent examination of the body, demonstrated that her death was caused by a wound penetrating her breast, passing entirely through the body and piercing her heart in its passage and that the wound could have been produced by a ball fired from the pistol which was found.

The commonwealth further proved, that on several occasions prior to the shooting, the prisoner said to the witness produced, that he wanted to marry the maid, but that his mother objected, or words to that effect, but that before any other man should have her, he would shoot her, and in addition to this, they have proved repeated confessions by the prisoner, since the shooting, that he committed the act.

The Commonwealth pointing to these facts—the death of Emily Myers; the threats of the prisoner that he would shoot her if she refused to marry him—his declaration that he had shot her because she would not marry him; the use of a deadly weapon on a mortal part of her body; the absence of all legal provocation, and perhaps to other circumstances and facts which I may have omitted, but which you will recall, asks you to apply the rules of the law to these facts, and to say whether or not in your opinion a *prima facie* case of murder of the first degree has been made out against John Coyle, Jr., the prisoner at the bar.

If you shall be of opinion that *prima facie,* the offence charged in the indictment has been made out, or that any unlawful killing has occurred, you will then proceed to inquire into the defence which has been here interposed on behalf of the prisoner, viz: Such a degree of mental unsoundness at the time the act was committed as rendered him irresponsible to the criminal law of this Commonwealth. The killing is admitted but it is said it was done at a time when the prisoner's reason was overthrown and the power over his will gone. This is an extremely delicate question to deal with, and is entitled to receive at your hands and mine the most serious consideration.

You will remember that the common law definition of murder applies only to persons of "*sound* memory and discretion;" and the statute law of this commonwealth (act 31 March, 1860, Sec. 60), provides that "In every case in which it shall be given in evidence upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offence and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and declare whether he was acquitted by them on the ground of such insanity." So that neither at common law nor by the statute, are those persons held legally responsible for their acts, who have been smitten in the seat of reason to a degree which amounts to insanity as used in the statute.

But what is such a degree of mental unsoundness or insanity, as will absolve one who asserts it from criminal responsibility for his acts, and what is the measure of the proof necessary to establish it? These are questions vitally important to a proper consideration of this case.

Said a Chief Justice of Pennsylvania in the case of the Commonwealth *v.* Mosler, 4 Barr 266, "insanity is mental or moral, the latter being sometimes called homicidal mania, and properly so. A man may be mad on all subjects and then though he may have a glimmering of reason he is not a responsible agent. This is general insanity; but if it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defence to an accusation of crime. It must be so great as entirely to destroy his perception of right and wrong, and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination controlling his will, making the commission of the act in his apprehension a duty of overruling necessity."

Again: "Partial insanity is confined to a particular subject, being sane on every other. In that species of madness it is plain that he is a responsible agent if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment although he may be laboring under a moral obliquity of perception, as much so as if he were merely laboring under an obliquity of vision," and again—"the law is that whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject and to have taken away from him the freedom of moral action." Said Tindal (in McNaughter's case, decided in

1843) in answer to a question propounded to him as one of the Judges to the House of Lords in England, "to establish a defence on the ground of insanity it must be clearly proven that at the time of the act, the accused was laboring under such a defect of reason from a disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."

This, said the Lord Chief Justice, is a more accurate way of putting the question to the jury, than simply whether the accused at the time of doing the act, knew the difference between right and wrong.

But the standard is substantially the same—instead of the abstract question of right and wrong, it is the prisoner's knowledge of right and wrong in respect to the very act with which he is charged.

And again in Sayres *v.* Commonwealth, 7th Nor. 291, a case which the Supreme Court said was tried with marked accuracy and care by the Court below, it was said, "that if the prisoner at the bar, at the time he committed the act, had not sufficient capacity to know whether his act was right or wrong; and whether it was contrary to law, he is not responsible, that is in fact general insanity, so far as the act in question is concerned, and it must be so great in extent and degree, as to blind him to the natural consequences of his moral duty, and must have utterly destroyed his perceptions of right and wrong."

But suppose the prisoner able to distinguish between right and wrong, and yet laboring under partial insanity, hallucination or delusion, as to existing facts, commits an offence in consequence thereof, is he thereby excused? To this question the English Judge answered: "Assuming that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life and he kills that man as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

But there is another kind of insanity, to which allusion has only very briefly been made, namely, homicidal insanity, which consists of an irresistible inclination to kill or to commit some other particular offence. Said Chief Justice Gibson, in the case already cited: "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations and can be recognized only in the clearest cases. It ought to have been habitual or at least to have evinced itself in more than a single instance." In Sayres *v.* Com., before referred to, the Court said, "as a general rule it will be found that instances are rare of homicidal insanity occurring wherein the mania is not of a general nature, and results in a desire to kill any and every person who may chance to fall within the range of the maniac's malevolence. As it is general, so also it is based upon imaginary, and not upon real wrongs; if it is directed against a particular person (as is sometimes the case) then also the cause of the act will be imaginary. When therefore the jury finds from the evidence, that the act had been the result not of an imaginary but *real* wrong, they will take care to examine with great caution into the circumstances of the case, so that with the real wrong, they may, or may not, also discover revenge, anger and kindred emotions of the mind to be the real motive, which has occasioned the homicidal act."

A learned author has said "that the mind is always greatly troubled when it is agitated by anger, tormented by an unfortunate love, bewildered by jealousy, overcome by despair, haunted by terror or corrupted by an unconquerable desire for vengeance. Then, as is commonly said a man is no longer master of himself; his reason is affected, his ideas are in disorder, he is *like a mad man.*

But in all these cases a man does not lose his knowledge of the real relations of things; he may exaggerate his misfortune but his misfortune is real; and if it carry him to commit a criminal act is perfectly well motived."

So that from the authorities cited and from others to which we could easily refer, we gather:

1st. When general insanity is set up as a defence, the test of it is the power or capacity of the prisoner to distinguish between right and wrong in reference to the particular act in question.

2nd. When partial insanity is alleged, the test is the prisoner's belief in the real existence of facts which are entirely imaginary, but which if true would be a good defence—and

3rd. When homicidal mania is the prisoner's plea, he should establish by clear evidence, an irresistable inclination to kill and that he was utterly unable to control his will, or subjugate his intellect, and that he was not actuated by anger, jealousy, revenge and kindred evil passions.

I have referred to these various forms and manifestations of insanity, because I do not quite understand the particular kind which is set up as a defence in this case. One of the prisoner's counsel called it an "insane delusion at the time the act was committed. Again that the prisoner's delusion was that he "had not the means of getting married." The other of the learned counsel for the prisoner said that "his insane desire to marry was doubtless produced by his secret habit, and this was a mania—a monomania." Again he said "he didn't mean to say the prisoner was frantic or a maniac at the time he shot the deceased, but that his mind was so deceased that he didn't know or comprehend what he was doing.

Whether from this we are to suppose that insane delusion in the sense of partial insanity; or mania in the form of homicidal mania, or general insanity, as we have described it is meant, is for you to say from the evidence. But whatever form is meant, by whatever cause produced, we have endeavored to furnish you with the legal test of its existence to the extent and degree which the law requires before it can operate to acquit the prisoner; the application of these principles to the facts is for you. Let us inquire now into the measure of proof necessary to establish insanity when it is alleged as a defence. In the first place I observe, insanity is never presumed; the law presumes sanity as the normal condition of man, and when the killing is admitted as in this case, the prisoner must satisfy the jury that insanity existed when he committed the act, and if the evidence leaves the mind of the jury in doubt as to the insanity, it will not justify an acquittal. The proof therefore must be satisfactory, it must be clear. The Supreme Court has used the following expressions as to the measures of proof. In Ortwein *v.* Commonwealth, 26 P. F. S. 421, "the evidence must be sufficient to fairly and reasonably satisfy you," "evidence must fairly convince them." In Lynch *v.* Commonwealth, 27 P. F. S. 207-213, "The evidence must fairly convince you;" "it is the duty of the defendant to satisfy the jury that insanity existed."

In Brown v. Commonwealth, 28 P. F. S. 123-124: "To establish this defence (viz: insanity), it must be clearly proved by satisfactory and clearly preponderating evidence—"the weight of the evidence must preponderate." In Laros *v.* Commonwealth, ibid page 212-213: "Duty of defendant to satisfy the jury

that insanity exists," "he must prove to your satisfaction,"—"it must be clearly proved." See also Pannel *v.* Com., 5 Norris 260.—The fifteen judges of England informed the House of Lords that the jury "should be told insanity must be *clearly* proved."

In Ortwein *v.* Com., above cited, the Supreme Court said, "Soundness of mind is the natural and normal condition of man and is necessarily presumed, not only because the fact is generally so, but because contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated and adjudged to be a reasonable being until a fact so abnormal as a want of reason positively appears. It is therefore not unjust to him that he should be so conclusively presumed to be until the contrary is made to appear on his behalf. To be made so to appear to the tribunal determining the fact, the evidence of it must be satisfactory and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature.—"And again," says the same learned judge who delivered the opinion of the court—"if this reasoning were even less than conclusive, the safety of society would turn the scales; merely doubtful evidence of insanity would fill the land with acquitted criminals. The moment a great crime would be committed, in the same instant, indeed often before, would preparation begin to lay ground to doubt the sanity of the perpetrator. The more enormous and horrible the crime, the less credible by reason of its enormity, would be the evidence in support of it; and proportionally weak would be the required proof of insanity to acquit of it."

The defence in support of its theory of mental unsoundness has produced a number of witnesses who have testified as to the mental condition of the prisoner at various periods of his life. His parents have told us of his childhood and his manhood; of his mental deficiencies when young, and his growing infirmities as he advanced in life. They have, as have the other witnesses produced, given their reasons for the opinions they have expressed, the facts and circumstances upon which they based them. And many of these witnesses have said that from the observation they made of the prisoner, his conversations, conduct and other peculiarities, they believe him of unsound mind.

The defence further points to his secret vice and dissipated habits, as having in a measure at least, caused his mental infirmity; and they also point to his attempt at suicide, at the time of shooting, as evidence of his actual insanity. It is perhaps proper to say to you as matter of law that even if you believe the prisoner really intended to take his own life, this would not be of itself evidence of insanity. It would only be a circumstance in the case to be considered by you in connection with other facts and circumstances for the purpose of enabling you to determine the mental condition of the prisoner. The fact of the attempted suicide raises no presumption of insanity (24 P. F. S. 178).

Some of the witnesses, perhaps only one or two, produced on behalf of the prisoner, spoke of him as "weak minded, a simple, foolish fellow," and perhaps other like expressions. That is not the kind of mental infirmity that excuses crime. The law cannot and does not measure an intellect to determine whether it is weak or strong: it has furnished a test very different from mere weakness.

To meet the defence set up, the Commonwealth has produced a large number of witnesses who have testified to the mental soundness of the prisoner, at various periods of his life. The school master who taught him when he was about fourteen; persons with whom he has had business intercourse and social relations; persons who have been employed on the

premises, and who have had an opportunity of conversing with him from time to time, and observing his actions, conduct and manner, and they have said in their opinion he was of sound mind.—They have given you the facts upon which their opinions are based, and it is for you to say what value you attach to such opinions. It is for you to say whether you can reconcile the statements of all these witnesses and if not, how you will determine between them. I shall not pretend to enter fully into a discussion of the evidence. You have had, as said at the opening of this charge, the benefit of elaborate comment upon it, and you will doubtless recall whatever is important should be remembered.

It is for you to determine exclusively and I have only adverted to such portions of it as seemed proper, preferring to leave its impression upon your minds undisturbed by comments of my own. It is proper to say to you, that if after fully weighing the whole evidence you entertain a reasonable doubt of the prisoner's guilt it will be your duty to acquit him.—But this doubt, said a distinguished jurist, "must fairly arise out of the evidence, and not be merely fancied or conjured up." A jury must not raise a mere fanciful ingenuous doubt to escape the consequences of an unpleasant verdict. It must be an honest doubt—such a difficulty as fairly strikes a conscientious mind and clouds the judgment.

I have thus endeavored to define to you the crime charged in the indictment, together with the other kinds of unlawful killing recognized andd punished by the laws of Pennsylvania. I have adverted in a general way to the evidence relied upon by the Commonwealth to make out a *prima facie* case. I have further dwelt upon the law of insanity as I find it given us by the highest judicial tribunal in this Commonwealth, and I have sought to make you understand, not only the various forms and the legal tests applicable to each, but also the measure and character of the proof necessary to sustain a defense, which rests upon it. In doing this my earnest effort has been not to attempt to wander from the pathway of those who have gone before me, but adhere closely and strictly to the line which they have marked out, and given to us for our sure guidance. If I have erred in any particular to the prisoner's injury, it is an infinite satisfaction to me that the appellate tribunal of the Commonwealth can and will correct my error.

And now, gentlemen, I submit to you the case of the Commonwealth *v.* John Coyle, Jr. You and each of you have sworn that you have no convictions unfavorable to capital punishment, you have said that you have no bias or prejudice for or against the prisoner and that you had formed no opinion as to his guilt or innocence that would for a moment influence or control your verdict. You were therefore fit to enter the jury box and listen to the evidence and the law. You have heard both, and now your sworn duty is to render a *true* verdict upon them.

You are not to be frightened from your duty from rendering a fair and impartial verdict by any fear of what the punishment may be. With that you have nothing to do. It follows the crime and not the verdict. It is pronounced by the court and not by the jury. You will therefore follow whatever the evidence may lead, calmly considering it in the light of the principles of law which have been given to you, and render such a verdict as will satisfy your own consciences, and do justice to the prisoner and to society, which is the Commonwealth.

If after you have considered it with all the seriousness and care the momentous issue involved requires, and shall be of opinion the prisoner is guilty in manner and form as he stands indicted, your ver-

dict will be "guilty of murder in the first degree." If you shall find that he is not guilty of murder of the first degree, but guilty of murder of the second degree or manslaughter, you will render a verdict in accordance with such finding. But if you shall be of opinion that the prisoner was of unsound mind at the time the offence was committed and to a degree that renders him irresponsible for his acts, then your verdict will be "not guilty because of insanity."

The following reasons were filed for a new trial:

1. That the return of the Jury Commissioners and Sheriff to the writ of *venire* issued by the Court, is not a proper and legal return to the writ and does not set out the number of persons summoned to serve as jurors, nor the day, month or year when they are to appear in court to serve as jurors.

2. The special jurors summoned to act as jurors in this case were not returned as summoned from "the body of the county" and were not required in the special *venires* to be summoned from "the body of the county" as required by law, and said *venires* are not authenticated by the seal of the said court and the returns to said *venires* are not under seal.

3. The verdict is against the law and the evidence.

4. The verdict is against the weight of the evidence.

5. The Court erred in saying to the jury in its general charge as follows: "To meet the defence set up, the Commonwealth has produced a large number of witnesses who have testified to the mental soundness of the prisoner, at various periods of his life. The school master who taught him when he was about 14—persons with whom he has had business relations—persons who have been employed on the premises and who have had an opportunity of conversing with him from time to time, and observing his actions, conduct and manners, and they have said in their opinion he was of sound mind. They have given you the facts upon which their opinions are based and it is for you to say what value you will attach to such opinions. It is for you to say whether you can reconcile the statements of all these witnesses, and if not, how you will determine between them."

6. The Court erred in charging the jury as follows: "There may be unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations and can be recognized only in the clearest cases. It ought to be shown to have been habitual or at least to have evinced itself in more than a single instance."

7. The court erred in their answers to the defendant's 1st, 2nd and 3rd points.

8. The court erred in charging the jury as follows: "When partial insanity is alleged, the test is the prisoner's belief in the real existence of facts which are entirely imaginary, but which if true would be a good defence."

9. Also in charging as follows: "When homicidal mania is the prisoner's plea, he should establish by clear evidence an irresistible inclination to kill, and that he was utterly unable to control his will, or subjugate his intellect, and that he was not actuated by anger, jealousy, revenge and kindred evil passions."

10. Also in charging the jury as follows: "I have referred to these various forms of insanity, as I did not quite understand the particular kind which is set up as a defence in this case. One of the prisoner's counsel calls it 'an insane delusion' at the time the act was committed. Again that the prisoner's delusion was that he 'had not the means of getting married.' The other of the learned coun-

sel for the prisoner said, that 'his insane desire to marry was doubtless produced by his secret habit, and this was a mania —a monomania.' Again he said, 'he didn't mean to say the prisoner was frantic or a maniac at the time he shot the deceased, but that his mind was so diseased that he didn't know or comprehend what he was doing.' "

11. Also in charging the jury as follows: "And if the evidence leaves the mind of the jury in doubt as to the insanity it will not justify an acquittal."

12. The Court erred in their charge as to the manner of proof required to establish the unsoundness of mind of the defendant.

Afterwards the following additional reasons were filed:

And now, to wit, December 5, 1881, the defendant by his counsel respectfully moves the court for leave to file the following additional reasons in support of his motion, and reasons already filed, for a new trial and in arrest of judgment.

That Peter Heiges, one of the jurors in the regular panel, and in attendance as said juror at the October sessions, A. D. 1881, of said court, and who was afterwards duly called, sworn, empaneled, and who sat as a juror on the trial of said case, and rendered his verdict of "Guilty of murder in the first degree," against said defendant, did, while attending as a juror at said court and shortly before he was called and sworn as a juror in the trial of said case, in the presence of several persons of respectability and veracity then and still in full life, and who are ready to testify to the same, declare and say as follows, to wit: "That man" (meaning said John Coyle, Jr.) "must be a rascal; he ought to be hanged, and if I was on the jury I would hang him." And that the fact that said Peter Heiges had so declared was not known to said defendant or his counsel until after the verdict in said case had been rendered, and not until said original motion and reasons had been filed. And deponent further says that he believes said jury was unduly influenced, and did not try said case fairly and impartially.

H. L. FISHER.

1. The Court erred in saying on page 14 of the charge, as follows:

"When general insanity is set up as a defense, the test of it is the power or capacity of the prisoner to distinguish between right and wrong in reference to the particular act in question," the Court should have added in this connection the additional element to complete the definition given, "and to adhere to the right and avoid the wrong."

2. The Court erred in saying on pages 17 and 18 of the charge, as follows:

"The evidence of it (insanity) must be satisfactory, not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature."

3. The Court erred also in saying on page 19 of the charge, as follows:

"It is perhaps proper to say to you as matter of law, that even if you believe the prisoner really intended to take his own life, this would not be of itself evidence of insanity. It would only be a circumstance in the case to be considered by you in connection with other facts and circumstances for the purpose of enabling you to determine the mental condition of the prisoner."

4. The Court erred in overruling defendant's objection to offer "B."

5. The Court erred in overruling defendant's objection to the testimony of Frank J. Magee.

6. Because Bievenour, one of the jurors on his *voir dire* declared in open court in the presence of jurors empaneled and sworn, and also in the presence of other jurors of the panel from whom jurors to try the case were to be selected, "I say hang him," which declaration was calculated to, and as the deponent believes, did greatly prejudice the defendant's case.

7. Because the public mind, from the time of the occurrence up to and during

the trial has been greatly and unduly excited against the prisoner, by public rumor and report, and by public discussions in the newspapers hostile to the prisoner, whereby the prisoner was deprived of a fair and impartial trial by the jury.

H. L. Fisher and W. C. Chapman for motion.

E. D. Ziegler and Geo. W. McElroy, contra.

December 19, 1881. WICKES, A. L. J. It is difficult to deal with the numerous reasons filed for a new trial in this case. Some were abandoned on the argument —some not alluded to at all—and those relied on, with one or two exceptions, argued in such general terms that it was not easy to tell precisely to what reasons the argument applied. Some of these reasons were filed October 27th, and the remainder on December 5th.

Of those presented on October 27th, the first and second were formerly abandoned at the argument, others because, even if the irregularities alleged are true, they could not be taken advantage of after the verdict.

The third and fourth are to the effect that the verdict was against the law and the evidence and against the weight of the evidence. These reasons were not pressed upon us, except in what was said incidentally in commenting upon other questions involved. But had they been we could not sustain them or either of them as we understand and appreciate the law and evidence of this case.

The seventh relates to the Court's answers to defendant's first, second and third points—but as no reference was made to this reason, we think it fair to assume that it also was abandoned. At all events the answers are part of the record and speak for themselves, should the appellate court of the State be asked to pass upon the questions involved;—to us they suggest no error.

The fifth and tenth reasons were not alluded to at the argument, and without the aid of criticism by the defendant's counsel we are wholly unable to discover the error which lies hidden in them.

The sixth, eighth, ninth, eleventh and twelfth refer to the law stated in our general charge to the jury. We took occasion in preparing that, to give our authority for all that is referred to in these reasons, and to keep closely within the limits of the Supreme Court decisions upon similar questions—and we can only say, what, at the argument, was admitted by prisoner's counsel, that if we are wrong, the Supreme Court is also in error, and that error can only be set straight by that tribunal.

Of the additional reasons filed on the 5th of December, the one relating to the conduct and expressions of Peter Heiges, one of the jurors, was abandoned at the argument and need not therefore be further commented upon. He practiced no concealment whatever, but said frankly upon his *voir dire* that he had formed and expressed an opinion but that it would not influence his verdict—he was accepted without objection. (Com'th *vs.* Flanagan, 7 W. & S. 415.)

Reasons one, two and three, filed at the same time, refer to matters of law contained in the charge—and as our authorities were there cited bearing upon the questions referred to, we need not refer to them here.

The fourth reason filed on December 5th and pressed at the argument is that we erred in overruling defendant's objection to offer "B."

Dr. Thompson was called as an expert, but had also examined the prisoner, to testify as to the cause of the wounds upon his person (see page 183 of notes). The objection urged against the admission of the evidence is that no sufficient ground was laid for the admission of his opinion. He testified that he had practiced medicine since 1852, and had treated gunshot wounds. He enumerated

three, but said he had treated a great many more (page 185).

The value of his opinion was for the jury, but surely we could not exclude it for the reason assigned. There was no error in this exercise of our discretion (13 P. F. S. 146, 156). It is proper in this connection to say that the bill of exceptions entered on the stenographer's notes, page 184, is an error and we have so entered on the margin. The exception was not taken or allowed until after cross examination of the witness, and properly appears on page 186.

It is also said we erred in overruling defendant's objection to the testimony of Frank J. Magee.

The witness held the inquest upon the body of Emily Myers, the girl killed by the prisoner, and he was asked whether the prisoner's father had not said on that occasion that the prisoner had shot at Emily Myers on the Saturday previous to the killing, but had missed her. It is objected that this contradiction of the father, who had denied saying this, is "purely collateral," and ought not to have been admitted. But the prisoner's counsel who urged this objection upon us, seems to forget what had before been testified to in regard to this same occurrence. I find on page 256 of the notes, in the examination of John Coyle, Sr., by the prisoner's counsel, the following:

"State whether or not you were at "home the Saturday previous to the "shooting? I was."

"Where was John? He was upstairs "in his room.

"Where was the girl that day? The "girl was in the kitchen, in the yard and "doing her work.

"Do you know of any shooting at that "girl by John on that day? No, sir, I "don't—I didn't know that the boy had "a pistol at all.

"You know nothing of his shooting at "her on that day? No, sir.

On cross examination he was at once asked by the Commonwealth, whether he hadn't said in Marietta in the presence of Mrs. Mack, that John shot at Emily Myers on Saturday before she was shot, and that he (the witness) took the pistol from him and hid it. This the witness denied, and Mrs. Mack was subsequently called to contradict him, and did contradict him, without objection. It is too plain for argument that under this state of fact, it was proper to continue the contradiction. But under any state of facts, it was proper evidence to go to the jury.

The only remaining reasons, the sixth and seventh, refer to an expression used by a juror when examined in court on his *voir dire*, and to the excitement in the public mind at the time of the trial.

It will scarcely be pretended that any expression by a juror under such circumstances, could avail a defendant after trial, and the case of the Commonwealth *vs.* Flanagan (7 W. & S. 415) decides the question as to the excitement in the public mind, flatly against the prisoner.

The reflection upon the jury made by one of the prisoner's counsel, is rather to be regretted, than seriously considered. Their conduct was marked by the utmost propriety and solemnity, and their verdict entirely justified by the law and evidence upon which it was based.

I am not unmindful of the momentous consequences to the unfortunate defendant involved in the view we have taken of this application, but we have no power to avert the shadow of that doom into which he is so rapidly passing, without trampling under foot the declared principles of law upon which the welfare of society so firmly rests.

He has "sown the wind," and unless there shall be some interference in his behalf elsewhere, he must "reap the whirlwind." And now to wit, December 19th, 1881, motion for new trial and in arrest of judgment overruled.

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QUARTER SESSIONS.

Com. vs. Wasson.

Criminal Law — Act April 17, 1876— Ex post facto laws.

The Act of 17 April, 1876, which provides "that it shall be unlawful for any person except physicians or surgeons to engage in the practice of dentistry, unless such person has graduated and received a diploma from the faculty of a reputable institution where this specialty is taught, or shall have obtained a certificate from a board of examiners duly appointed and authorized by the provisions of this act to issue such a certificate," and then provides a penalty for this offence, and afterwards except those who have been in continuous practice for three years, applies to persons practicing at the time of its passage.

The defendant was convicted of the offence described in the above Act. At the time of its passage, he was a practicing dentist, though for a less term than three years. HELD, That the Act deprived the defendant of his property or estate in his profession, which he enjoyed at the time of its passage, in some other way than by the judgment of his peers or the laws of the land.

The Act, as far as this defendant is concerned, imposes a punishment for an act which was innocent when done, and is therefore *ex post facto*, within the Constitutional provision.

The Act, so far as this defendant is concerned, would prevent his pursuing a profession for which he had fitted himself, on which his livelihood depended, and which he was following at the time of its passage. This is an attempt to punish him for an act done prior to the statute, and hence unconstitutional.

Motion in arrest of judgment. *G. W. McElroy* for motion.

E. D. Ziegler and W. F. Bay Stewart, contra.

February 20, 1882, WICKES, P. J. The defendant in this case was indicted for practicing dentistry in violation of the provisions of the act of April 17, 1876, P. L. 39. It provides *inter alia* as follows: that it shall be unlawful for any person (except physicans and surgeons) to engage in the practice of dentistry, "unless such person has graduated and received a diploma from the faculty of a reputable institution where this specialty is taught" * * * * * * * or shall have obtained a certificate from a board of examiners duly appointed and authorized by the provisions of this act to issue such certificate.

Sec. 6, provides for indictment in the Quarter Sessions, and a penalty of not less than fifty nor more than two hundred dollars; it further provides for the recovery by the patient or his heirs of all fees that shall have been paid for services rendered in violation of this act.

Sec. 8 provides that the provisions of the act shall not apply to persons who "have been engaged in the continuous practice of dentistry in this State for three years or over at the time or prior to this act."

The defendant had never been graduated from an institution where this specialty was taught, nor had he ever appeared before the board of examiners appointed under the act—he had therefore received no diploma or certificate. He was however engaged in the practice of dentistry at the time the act was passed, but for a less period than three years. Upon this state of facts we are asked to arrest the judgment:—

1st. Because the act was not intended to apply to persons practicing at the time of its passage, although for a less period than three years, and:—

2nd. Because if so intended the act is unconstitutional, and void as to them.

We think the first position is not tenable because it would seem to be a necessary implication from the section which provides that the act shall not apply to those who have practiced three years prior to its passage, that it was intended to embrace all those who have been so engaged for a less period of time. It is said we must read the statute as if it did not contain that proviso at all, but it is an established rule in the exposition of statutes that the intention of the law giver is to be deduced from a view of the whole and of every part of a statute taken and compared together, and although the act in question is highly penal in its character and retroactive (14 P. F. S. 495 and 17 P. F. S. 485) we cannot get rid of its plain phraseology and read out of it words which clearly indicate the intention of the legislature.

The second proposition, however, presents a much more serious question.

It must be conceded upon principle and authority, that among the rights reserved to the State, is the right to determine the qualifications for office—and the conditions upon which its citizens may exercise their various callings, and pursuits within its limits, and it is not questioned in this case, that the act in controversy is quite within the reserved power of the State so far as it is prospective in its operation; nor is it said to be unconstitutional simply because retrospective in its action, for such legislation is nowhere prohibited, unless it works the destruction of rights previously attached, or has some other effect prohibited by the fundamental law.

Is the act in question, so far as it applies to this defendant, open to objections of this character?

The fundamental law of the United States, and of the State of Pennsylvania, alike prohibit the taking of the citizen's life, liberty or property, unless by the judgment of his peers or the law of the land.

They also prohibit the passage of any *ex post facto* law or bill of attainder. If, therefore, the act under which the defendant was indicted, does one or the other or all of these, either directly or indirectly, it cannot be permitted to stand, and it will not save the statute to say that it was passed in pursuance of that power which the State may exercise over matters of internal policy.

Is a man's profession or employment his property? and what do we mean by judgment of his peers or the law of the land. In the case of Cummins *vs.* the State Missouri, 4 Wall. 277, the Supreme Court said, "the learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law. * * * He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors." The learned counsel who appeared for the Commonwealth conceded the defendant's right to practice his profession, as property in legal contemplation, but the argument proceeded on the ground that the process by which it is sought to deprive him of it, is what the Constitution means by "due process of law."

But I do not so understand it. Said Thomson, J., in Fetter *vs.* Wilt, 10 Wr. 460, "'Judgment of his peers,' is a term of expression borrowed from *Magna Charta* and it means a trial *per pais* or by the country, which is a trial by jury. The words 'or the law of the land,' have the same origin and are to the same effect as 'due process of law' in the bill of rights in the Constitution of the United States, and it means judgment of the law in its regular course of administration through Courts of Justice."

The question before the Court in that case was the constitutionality of Act of 22d April, 1822, which authorized the seizure and sale of the enumerated articles, if used for traffic within three miles of any place of religious worship during the time of holding any meeting for that purpose. "Nothing (said the Court) more despotic could be imagined than the power claimed under the Act of Assembly." And yet it did not more completely forfeit the rights of property "without due process of law," than does the act before us. Indeed, it was far less severe in its provisions, because it imposed no restraint upon the offender's right to continue his business elsewhere, whereas the act in question must result in driving persons, situated as is the defendant, from the further prosecution of his profession.

"Due process of law" means not a legislative, but a judicial act. The judgment of the law as expressed through the courts can alone produce the effect, here sought to be given to an act of Assembly.

It is no answer to say, as was said at the argument, that the prosecution now

pending is the "due process of law" contemplated by the Constitution. It rather proceeds upon the theory that the defendant's rights have also been swept away by legislative enactment, and that nothing remains to him but the annihilation of his business, or submission to the pains and penalties imposed upon him by the statute.

We can but think, that the effect of the act is to forfeit the estate of the defendant in his profession—to destroy a vested right which he enjoyed at the time it was passed, and thus deprive him of his property by a process rather ministerial than judicial, and wholly different from that which is meant by the "judgment of his peers or the law of the land."

But apart from this view of the question, we are of opinion that this act of 1876, so far as it applies to the defendant, imposes a punishment for an act which was innocent when done, and is therefore *ex post facto,* within the Constitutional prohibition.

Said Chancellor Kent, in defining *ex post facto* laws, "All laws passed after the act and affecting a person by way of punishment in his person or estate, are within the definition." And said the Court in Colden *vs.* Bull, 3 Dale 386, "every law that makes an action done before the passage of the law, and which was innocent when done, criminal, and punishes such action," is *ex post facto,* and of course within the inhibition contained in the Constitution. But we are told there is no attempt here to punish the defendant for any act done by him prior to the statute, and that it was only necessary for him to abandon the practice of his profession to avoid the penalties prescribed.

Can it be that there is no punishment inflicted by an act which takes away from a man the profession or employment upon which his livelihood depends? Which in effect says to him—"True, you have spent your time and money in preparing yourself for this profession, and you engaged in the practice possessed of all the qualifications required to satisfy the existing laws and commend you to the public, but since then we have discovered that the public welfare requires that such skill as you profess shall be avouched by a diploma, and as you have not got it, and did not require it, we make this law relate back to the time you began to practice, and you must pay the forfeit, or abandon your occupation, upon which the support of your family depends—your act was innocent before this law was passed, but we make the continuance of it criminal."

This was substantially the argument addressed to the Supreme Court of the United States in Cummins *vs.* the State of Missouri before referred to. The Constitution of the State provided a test oath, which in form created a qualification for office, and attached certain conditions as essential to the right of the citizens to engage in the various professions, callings and pursuits enumerated in the act. No one questioned the right of the State to prescribe these qualifications and conditions, but when it was attempted to apply the test to those already engaged in the employments mentioned, it was held to be in the nature of a bill of pains and penalties, and to inflict a punishment within the meanings of an *ex post facto* law.

Said Mr. Justice Field, delivering the opinion of Court, "disqualifications from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the Courts, or acting as executor, administrator or guardian, may also, and often has been imposed as a punishment * * * Punishment is not restricted to the deprivation of life, liberty or property, but also embraces deprivation or suspension of political or civil rights."

The Court then proceeded to inquire whether such punishment was within the Constitutional prohibition — and after

elaborate research and argument it was held to be a bill of pains and penalties, and *ex post facto* within the meaning of the Constitutional prohibition that "no State shall pass any bill of attainder, or *ex post facto* law."

Said the Court, "the theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all homes, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law."

It were vain and futile so to declare if the qualifications for these avocations may be added to or changed time and again, perhaps in the interest of some dominant class, until under the guise of the public weal, all opposition is driven from the field.

In the cases referred to, there was nothing to prevent the proscribed class from discontinuing their employment and engaging in some other pursuit not guarded at its threshold by an impossible condition; but the Court said in effect, no—this is practically punishment for past conduct, and no matter under what form presented, it is an attempt to sweep away the constitutional rights of the citizen before the dangerous front of bare-faced power.

Nor does it save the obnoxious features of the act in question, that those affected by it, may appear before the board of examiners it creates. If the statute did not forfeit their rights, there would be no necessity for a method by which to reinstate them.

In the case we are considering, no punishment for past conduct may be intended—certainly no act criminal in itself was committed by the defendant, under the law as it stood prior to the enactment of this statute. Indeed, it may be conceded that the act was passed entirely in the interest of the public, and will produce the best practical results. It, nevertheless, operates disastrously upon a class, whether so intended or not. It drives from their established business, men of mature years with their family ties and dependencies, and remits them to the hall of some "reputable institution," or sends them before a "board of examiners" armed with the absolute power to end their professional careers.

We can but think such legislation is retrospective in a sense which renders it void, because it has an effect prohibited by the fundamental law. We therefore arrest judgment.

WE are indebted to Messrs. Rees, Welsh & Co., the well known law book publishers, of Philadelphia, for a copy of 1 Luzerne Legal Register Reports, edited by Geo. B. Kulp, Esq., and published by the above-named firm.

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YORK LEGAL RECORD.

VOL. II. THURSDAY, MARCH 2, 1882. No. 52.

COMMON PLEAS.

Hartman v. Kottcamp's Executors.

Justice of the Peace—Certiorari—When allowed—Record of—Proofs made.

In a suit before a Justice of the Peace, the executor of a deceased party was sued with living parties. HELD, on certiorari, to be amendable.

The appearance of the defendant before the justice cured a defective service.

In the Justice's record it is not necessary to state that judgment was given *publicly*, that being presumed.

The record showed that judgment was given after investigating plaintiff's claim. HELD, to be equivalent to the statement that *proof* was made, in the absence of evidence to the contrary.

Where a Justice has no jurisdiction of the subject matter, that is, where the jurisdiction has never been conferred by Act of Assembly, or where he has not any jurisdiction of the parties, by reason of the summons never having been in fact served, or legally served, or where there has been fraud in obtaining judgment, a certiorari may be allowed at any time by the court on cause shown.

Certiorari to George G. Kraber, Esq., successor to John A. Metzel, Esq.

The facts sufficiently appear in the Court's opinion.

E. W. Spangler for certiorari.

Blackford & Stewart, contra.

February 18, 1882. GIBSON, A. L. J. This certiorari was issued and served on the 3rd day of January, 1882, to bring up the record of a judgment rendered on the 27th of September, 1876, by John A. Metzel, Esq., in favor of the plaintiff, for $52.45. The term of said Justice having expired, a transcript of the proceedings had before him was certified to by George B. Kraber, Esq., and a *scire facias* was issued by the latter Justice on the same. This certiorari issued to George B. Kraber, Esq., and the record of the proceedings before him have been returned; to which exceptions have been filed on behalf of Mary Kottcamp, executrix of J. F. Kottcamp, deceased, and the same submitted to the court on argument.

The first exception is that the suit was improperly and illegally brought, there being joined as defendants, living parties with the representatives of a deceased party.

Errors both in form and substance are committed in originating suits before Justices of the Peace, and for that reason, the suit is *de novo* in the Common Pleas, where all necessary amendments may be allowed for the purpose of trying the cause on its merits: Comfort *v.* Leland, 3 Wharton 82, and cases then cited. The error in this case is amendable. The misjoinder of the administrators of a deceased co-partner with surviving partners was held to be amendable under the act of May 4, 1852, P. L. 574; and the amendment was permitted in the Supreme Court with same effect as if made in the court below: Hoskinson *v.* Eliot, 12 P. F. S. 404. The first objection is not sustained. The second and fourth exceptions were abandoned on account of a mistake in the transcript.

The third exception is not sustained because a connected reading of the record shows a summons issued and served by leaving a copy at Mary Kottcamp's dwelling house in the presence of one of her neighbors. And the fifth exception is not sustained because the defendant executrix has admitted the service and also that she had appeared before the Justice on the day mentioned in the summons. The sixth exception is not sustained, because judgments of a Justice are presumed to have been publicly given from the public character of the office; Snyder *v.* Carfroy, 1 P. F. S. 96; Daley *v.* Nolan, 6 Phil. 370. The seventh exception is not sustained, because the record shows that judgment was given after investigating plaintiff's claim, and that is a form of stating that proof was made, in the absence of evidence to the contrary.

Whatever of error there may be in the foregoing exceptions, could have been taken advantage of, on certiorari issued

within twenty days after the judgment, under the act of Assembly. Where a Justice has no jurisdiction of the subject matter, that is, where the jurisdiction has never been conferred by act of Assembly, or where he has not any jurisdiction of the parties, by reason of the summons never having in fact been served, or where there has been fraud in obtaining judgment, there a certiorari may be allowed at any time by the court on cause shown. In this case the defendant administratrix offers parol evidence to show want of notice of the judgment, and asks for that reason to be relieved from the responsibility of taking out a certiorari within the statutory twenty days; and that when she appeared before the Justice he made a remark which might mean that the suit against her was abandoned. But assuming that her own testimony is admissible (the plaintiff being dead), and assuming that she might be allowed twenty days after notice of the judgment, instead of from the time it was rendered; Brookfield *v.* Hill, 1 Phila. 439; we find from the letter of the administrator of the plaintiff, that there was notice of the judgment by letter dated the 26 of November, 1881, and this certiorari was not issued until the 3d of January, 1882, a period of nearly forty days. A certiorari at any time, could not be sustained in this case, for want of jurisdiction of the subject matter of the parties, because the suit is on a promissory note under one hundred dollars, and the summons was served on this defendant. If there had been any allegation of fraud, by which a judgment was obtained in the face of a good defence filed, and that defendant failed to produce it before the justice for the reason that she was thrown off her guard, then there would have been a special allocatur. But in this case the judgment must be affirmed.

C. P. of Columbia Co.

Howard v. Jacoby.

Construction of the Act of Assembly of April 18th, 1874—What a candidate for nomination or election to office may and may not do.

1. The statute does not prohibit a candidate from employing a friend to canvass an election district for him, and by representations in regard to his qualifications, his claims for party support, or by any legitimate argument, operate upon the minds of the voters, and thus procure the return of delegates who will support him in the nominating convention. Such services are a sufficient consideration to support a promise to pay for them, together with necessary traveling expenses.

2. It is illegal for a candidate for nomination or election, either directly or indirectly, to pay, or promise to pay, an elector for his time and traveling expenses in attending the polls to vote for him.

3. Money loaned to a candidate for the purpose (known to the lender) of paying men to leave their work, attend a primary meeting, and vote for the borrower, cannot be recovered back.

Certiorari.

The opinion of the court was delivered by

ELWELL, P. J. The justice gave judgment for the plaintiff for six dollars and fifty cents upon a claim of three dollars for services in procuring delegates from Pine township to a nominating convention favorable to the nomination of the defendant for the office of register and recorder; also, "for six dollars and fifty cents, money borrowed at the instance of the defendant, and used by him in paying traveling expenses to election, and for men to leave their work and go to the primary election for defendant, and for liquor bills," etc., and "for two dollars paid for one gallon of whiskey furnished by the plaintiff at the instance of the defendant."

It does not appear whether there was a special contract to procure delegates to be elected from the township named who would vote for the defendant, or whether, having rendered services by request, the plaintiff seeks to recover upon a *quantum meruit*. It was not material to spread the claim more fully upon the record. The right of the plaintiff to recover that item of his claim depends upon the character of the services performed. If they were not prohibited by law, nor contrary to public policy and good morals, the contract therefor was a valid contract.

A candidate for nomination or election may freely and lawfully use all honest means to procure his success at the convention, or at the polls. The act of 18th April, 1874, (P. L. 64), expressly authorizes payments and contributions by candidates for printing, traveling expenses, dissemination of information to the public, political meetings, demonstrations, and conventions, but excepts out every direct and indirect purchase of the vote or influence of an elector, and every act for any corrupt purpose whatever incident to an election. What is clearly embraced within the terms above mentioned, and not excepted therefrom, is lawful. Interest may be made for a candidate without taint of corruption. Electioneering, as it is called, without the use of corrupt means, is not condemned by law. Even art may be used by a candidate in securing his election with pure motives and patriotic purpose. The statute forbids the perversion of art, not its use. Williams *v.* Commonwealth, 10 Nor. 503.

The statute is not to be so construed as to prohibit a candidate from employing a friend to canvass an election district for him, and by representations in regard to his qualifications, his claims for party support, or by any legitimate arguments, operate upon the minds of the voters, and thus procure the return of delegates who will support him in the nominating convention. Such services are not illegal, and are a sufficient consideration to support a promise to pay for them, including necessary traveling expenses. But the loan of money for the purpose set forth in the plaintiff's claim was illegal. Every contract made for or *about* any matter or thing which is prohibited, and made unlawful by a statute, is void. Badgley *v.* Beale, 3 Watts, 264. Money lent to be employed in an unlawful game, or any other illegal purpose, cannot be recovered back. Eelerman v. Reitzel, 1 W. & S. 181; 2 Smith's Leading Cases 346.

The act of 1874, in express terms, declares that it shall not be so construed as to authorize the payment of money, or other valuable thing, for the vote or influence of any elector, either directly or indirectly, at primary, township, general, or special elections, nominating conventions, or for any corrupt purposes whatever incident to an election.

Money paid or promised by a candidate to a voter for his day or traveling expenses in attending an election, or a primary meeting, and casting his vote for him, although such payment or promise is ostensibly made as a matter of friendship or charity, it is a violation of the act of Assembly, and of the provisions of article vii, section 1, of the constitution. It is not necessary, in order to bring a case within the prohibition of the statute, that the candidate in terms agreed to pay a certain sum as a consideration for a vote. Ordinarily, proof of corruption in such cases can only be established by the attending circumstances.

Where money is paid to a voter under the circumstances stated in this transcript, at least a *prima facie* case of illegality is established. If the purpose of this loan was not illegal, a candidate may lawfully proclaim that every voter for him will be paid for his time and travel. It needs no argument to prove that such an offer, whether made to few or many, is nothing more nor less than a money bid for votes, nor that there are persons entitled to vote who would be influenced by the sum promised or paid to cast their votes for the generous donor. In a canvass thus conducted, a competitor who depends upon his merits, instead of money, stands but a poor chance for success. Especially would this be the case if it was understood (as it is in all such cases) that the liberality of the candidate who distributes the money was limited to those who would cast their votes for him.

The purpose for which the plaintiff borrowed, and, as he alleges, expended the six dollars and a half, demanded in

this suit, was in part at least contrary to the statute, and in all respects contrary to the policy of the law. The plaintiff cannot state his case without exhibiting its illegality. No court will lend its aid to enforce a contract contrary to law or good morals, but will leave the parties where it found them. However it may be considered aside from the law, in law the condition of the defendant is the better.

The loan of the six dollars and fifty cents being one contract, and for purposes contrary to law, the judgment must be reversed.

The judgment is reversed.

C. P. of Lancaster Co.

Reinholds' Estates.

Where husband and wife, each owning separate estates, executed a deed of assignment for the benefit of creditors, in which each reserved the property secured them under the exemption laws of the Commonwealth. HELD, that they were each entitled to the benefit reserved.

Exceptions to auditor's reports.

January 30, 1882. PATTERSON, A. L. J. It appears that the above assignors are husband and wife, and each had and owned separate estates, and they executed, on the 20th of October, 1879, a deed of assignment to trustees, for the benefit of creditors, wherein and whereby each reserved so much of their several properties as the Act of Assembly exempting from levy and sale under execution secured to them.

The same persons were appointed and acted as assignees in both of the assigned estates. They had taken and filed *separate* inventories in the several estates and also filed separate and distinct accounts in each. These several accounts were excepted to and accordingly was referred to the same author to pass upon exceptions and to make distribution.

The auditor made distinct and separate reports in each estate, to which exceptions were severally filed and which were duly argued at December term.

To the report in John Reinhold's estate there are five distinct exceptions filed.

The 1st exception the Court is of the opinion cannot be sustained and must for the reason given by the learned auditor, be dismissed. The 2d, 3rd and 4th exceptions, upon the facts found by the auditor must be dismissed.

The 5th exception cannot prevail for the reason assigned by the auditor. The husband and wife—the assignors had separate estates, and each reserved in the deed of assignment, the property secured to them under the laws of the Commonwealth. On a careful examination of the testimony taken before the auditor, there is no attempt to show that John Reinhold's assignees had failed to charge themselves with any assets whatever, except the sum of $224.75, the amount and value of personal property, appraised and set apart to Mrs. Leah Reinhold out of her own separate property; nor is there any testimony of facts appearing on the whole record denying that Leah Reinhold, the wife, owned property in her own right. And having owned property under the married women's statutes, and having made the reservation, as stated in her deed of assignment, was not she entitled to the property appraised to her out of her own estate? We are of the opinion that she was, and that therefore the said 5th exception must be dismissed.

To the report of the auditor in the assigned estate of Leah Reinhold there are filed two exceptions. They both clearly embrace the item or sum of $224.75, appraised to his wife out of her own estate, and charge error in the finding of the auditor, not surcharging the accountants with that sum.

We are unable to see error in the auditor's disposition of that question, and we therefore dismiss the two exceptions filed to this latter report.

All the exceptions to the two several auditor's reports mentioned, having been dismissed, the Court now confirm absolutely the same.

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OF CASES REPORTED IN THIS VOLUME.

3. If the evidence leaves the mind of the jury in doubt as to the insanity it will not justify an acquittal.—*Ib.*

4. When general insanity is set up as a defense, the test of it is the power or capacity of the prisoner to distinguish between right and wrong in reference to the particular act in question.—*Ib.*

5. The evidence of it (insanity) must be satisfactory, not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature.—*Ib.*

6. It is perhaps proper to say to you as a matter of law, that even if the jury believe the prisoner really intended to take his own life, this would not be of itself evidence of insanity. It would only be a circumstance in the case to be considered by them in connection with other facts and circumstances for the purpose of enabling you to determine the mental condition of the prisoner.—*Ib.*

JURY. See COSTS, 8-10; *Infra*, 9.

7. The failure to attach the certificate required by statute to the list of persons selected to act as jurors during the year, is a serious but not an incurable irregularity. It may be amended, and a certificate be filed *nunc pro tunc*.—*Commonwealth v. Byrne et al.*, 83.

8. The failure by the sheriff to file his oath of qualification for drawing jurors is a serious irregularity, and a motion to quash on that ground, if made promptly, before recognition of the validity of the indictment will be sustained.—*Ib.*

NEW TRIAL.

9. It is no ground for a new trial that a juror, examined upon his *voir dire*, made use of the expression "I say hang him"; such juror being challenged for cause and the challenge sustained.—*Com. v. John Coyle, Jr.*, 199.

10. The fact that the public mind was greatly excited upon the subject of the murder, by public rumors and newspaper discussion, is no ground for a new trial.—*Ib.*

SELLING LIQUOR.

11. The act of April 12, 1875, P. L. 40, repeals all former legislation on the same subject, only so far as it supplies the place of such legislation.—*Com. v. Mummert*, 181.

12. The first and third counts of the indictment charged that the defendant "did sell, trade and barter" spirituous and malt liquors on Sunday. The evidence was of actual sale. HELD, that as the act of 1875 prohibited an actual sale of intoxicating drink on Sunday, the act of 1855 was repealed *pro tanto* and these counts of the indictment could not be sustained.—*Ib.*

13. The second and fourth counts of the indictment charged that the defendant "did allow and permit spirituous and malt liquors to be drank on and within the premises and house so kept by him," &c. HELD that this was an offence under the Act of 1855, which was not prohibited by the Act of 1875, and hence these counts must be sustained.—*Ib.*

TREES. CUTTING.

14. To complete the offence of maliciously cutting and destroying a certain bounded tree or other allowed land-mark, as described in the 153 section of the Criminal Code, the tree so cut must be *on the line*, must be an undisputed and allowed land-mark, and the cutting must be done maliciously.—*Com. v. Rauhauser*, 189.

TWO-TERM ACT.

15. Either application or assent of defendant to a postponement of his trial deprives him of his right to be discharged from imprisonment under Act of 18th of February, 1785, re-enacted by Section 54 of the Criminal Procedure Act of 1860. Nor need it appear that he expressly applied for or assented to the delay. His assent may be presumed from any action of his naturally tending to produce such a result.—*McGurk v. Superintendent of County Prison*, 33.

UNLAWFUL BY PRACTICING DENTISTRY.

16. The Act of 17 April, 1876, which provides "that it shall be unlawful for any person except physicians or surgeons to engage in the practice of dentistry, unless such person has graduated and received a diploma from the faculty of a reputable institution where this specialty is taught, or shall have obtained a certificate from a board of examiners duly appointed and authorized by the provisions of this act to issue such a certificate," and then provides a penalty for this offence, and afterwards excepts those who have been in continuous practice for three years, applies to persons practicing at the time of its passage.—*Com. v. Wasson*, 211.

17. The defendant was convicted of the offence described in the above Act. At the time of its passage, he was a practicing dentist, though for a less term than three years. HELD, that the Act deprived the defendant of his property or estate in his profession, which he enjoyed at the time of its passage, in some other way than by the judgment of his peers or the laws of the land."—*Ib.*

18. The Act, as far as this defendant is concerned, imposes a punishment for an act which was innocent when done, and is therefore *ex post facto*, within the Constitutional provision.—*Ib.*

19. The Act, so far as this defendant is concerned, would prevent his pursuing a profession for which he had fitted himself, on which his livelihood depended, and which he was following at the time of its passage. This is an attempt to punish him for an act done prior to the statute, and hence unconstitutional.—*Ib.*

DEATH.

EFFECT OF. GUARDIAN, 3.

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SUGGESTION OF. JUDGMENT, 4-5.

DEBTOR AND CREDITOR. APPROPRIATION, 1.

DECEDENT'S ESTATES.

ATTACHMENTS. ATTACHMENT, 2-7.

COSTS OF AUDIT. COSTS, 1.

CLAIMS AGAINST.

1. The claimant, when only five years old, was received by his uncle into his family, and supported and educated by him. He remained with his uncle until after he became of age, and was paid for all work done after he attained his majority. The claimant alleged that when he was fourteen years old he wanted to learn a trade, whereupon his uncle told him "that if he would stay with him he would give him more than his trade would ever be worth to him." Almost twenty years after this alleged promise, the uncle died, whereupon the claimant presented his claim before the Auditor for wages for services rendered in the interval between the making of the alleged promise, and the time he attained his majority which claim was allowed by the Auditor. HELD that the relation existing between the decedent and the claimant forbids any implied promise to pay for the services rendered; the claim lacked the element of certainty which is essential to a recovery; and was barred by the Statute of Limitations.—*Haney's Estate*, 105.

2. A promise made by the decedent to a third person "that if Levi would stay with him he would give him more than his trade would ever be worth to him," although afterward communicated to Levi, is not such an express and certain promise to pay as the law requires in cases of this nature.—*Ib.*

3. A son was employed by his father upon his farm, and the Auditor found that his claim for services so rendered was entitled to a preference. HELD, that a laborer on the farm is not entitled to the preference given to "servants," claims, by the Act of February 24, 1834.—*Graham's Estate*, 186.

WIDOW'S EXEMPTION. See ADMINISTRATORS, 1-2.

4. Where the widow of a decedent claims her $300 exemption in money, when there is no money belonging to the estate; declines to retain any of the personalty and refuses an appraisement of it, she can not wait until the personal property is sold and turned into cash and then apply for her $300 out of the proceeds.—*Venus' Estate*, 193.

5. A widow's right to claim $300 exemption is not ousted by her subsequent marriage.—Ib.

6. An administrator is a competent witness to prove the widow's notice of her exemption claim, where his only interest in the estate is compensation for services rendered.—*Ib.*

7. Where a verbal ante-nuptial contract was entered into by A., B., by which it was agreed "that in the case of the death of either, the property of the one so dying should go to his or her heirs, free from any claim by the survivor, B., upon the death of A., cannot claim her $300 exemption.—*Ib.*

8. In a contest between the widow and children of a decedent, as to her right to claim the $300 ex-

1. A notice in writing, at any time before the actual sale of the property, stating the amount claimed, for what, and out of what estate, is sufficient notice of claim for wages under the Act of April 9, 1872.—*Bennett's Estate*, 126.

2. The notice need not state the business in which the employer was engaged, the kind of services rendered by the claimant, and the particulars of the service, and that a lien is claimed upon the property seized by the officer; if these facts are found by the auditor on distribution it is sufficient.—*Ib.*

3. The notice to the Sheriff required by the Act of 9 April, 1872, must refer to the property to be sold, and claim a lien thereon. A bare memorandum of the amount due and the nature of the services rendered is not sufficient.—*Hoffacker v. Hoffacker*, 104.

4. Such notice must be served on the Sheriff before the sale.—*Ib.*

1. The clause of a will read as follows: "I give and devise to my two sons Huge McMullen and George McMullen the plantation that I now live on to be equally divided between them to them their heirs and assigns, for ever. Subject to the payment of thirty shillings yearly to my daughter Elizabeth during her natural life and one-third of the clear rent, yearly to my dearly beloved wife during her natural life. It is also my will that if either of my two sons, Hugh or George *should die without legitimate issue that the survivor shall inherit the whole of the deceased's part of the land aforesaid* * * * * * * It is further my will that my said two sons shall neither rent, bargain nor sell the land aforesaid, nor enter into agreements, indentures, or bargains of importance before they arrive to the age of twenty-one years but by the approbation and consent of my executors." HELD, to create an estate tail in each of his two sons, with cross-remainders in fee.—*McMullen v. Stone and Wall*, 21.

2. In an action of ejectment brought by a grandson of George, to recover part of the land devised to Hugh and George, and sold by a daughter of Hugh to the defendants. HELD, that Hugh's issue having become extinct, the land vested in the issue of George, and the plaintiff was entitled to recover.—*Ib.*

3. The word "survivor," in a devise of real estate, does not, by force of any settled legal construction, import a definite failure of issue, or confirm the limitation over to a person *in esse* at the death of the testator.—*Ib.*

4. If this construction of the will is correct, the result is not affected by the fact that Hugh left issue to survive him, which issue subsequently became extinct, nor that George died during the lifetime of Hugh's issue, for if the limitation overoperates as a vested remainder in fee, it would on the failure of Hugh's issue, pass to George, if living, not as a life estate or in tail, but in fee-simple, and if dead, would descend to his heirs.—*Ib.*

5. The clause of a will read as follows: "I give and devise to my two sons Hugh McMullen and George McMullen the plantation that I now live on to be equally divided between them to them their heirs and assigns, for ever. Subject to the payment of thirty shillings yearly to my daughter Elizabeth, during her natural life, and one-third of the clear rent, yearly to my dearly beloved wife during her natural life. It is also my will that if either of my two sons, Hugh or George, *should die without legitimate issue that the survivor shall inherit the whole of the deceased's part of the land aforesaid* * * * * * It is further my will that my said two sons shall neither rent, bargain nor sell the land aforesaid, nor enter into agreements, indentures or bargains of importance before they arrive to the age of twenty-one years but by the approbation and consent of my executors." HELD, that the terms of the will must be construed to contemplate an indefinite failure of issue, that therefore a fee tail was vested in the devisees with cross remainders over, and the plaintiff was accordingly entitled to recover.—*Stone and Wall vs. McMullen*, 157.

6. Such a construction will give way only when the will contains other expressions, showing an unequivocal intent on the part of the testator that his words shall not be construed in their technical sense.—*Ib.*

7. The testator in his will devised to his nephew, Adam Lehr, two tracts of land, subject to the payment of one hundred dollars per acre, the second of which containing about sixty-six acres and seventy-seven perches, was the one on which he charged for John and his children, the amount mentioned in the auditor's reports and the Court's opinion. He directed his executors to "collect all his property and estate," "and as soon thereafter as it can be most conveniently done to the best advantage to sell and convert the same into money, and to collect from the nephews all that may be then payable of the price of the lands devised to them, and to distribute the whole amongst the children of my deceased brother John or their descendants in the manner hereinafter directed." After providing for the children of Lucinda Hoff, a deceased daughter of his brother John, by directing that the sum of twenty-one hundred dollars should be taken out of the money charged on his land, and specially ordering how it should be divided among them, and if all should die under 21 years of age, and without issue, the sum so retained for them should immediately go to such of the children of his said brother John, or their descendants as may then be living, in the manner and proportions thereinafter directed, as to the residue of said remainder. Then he added: "All the residue of said remainder shall go to the rest of the children of my said brother John, or their descendants *per stirpes* and not *per capita*, however remote in degree, who may be living at the termination of the aforesaid life estate, excluding the descendants of Lucinda Hoff, who are fully provided for. Then he directs the shares of Mrs. Martin and Julia Bower, daughters of John, to be retained, and the interest paid to them during life. He follows that up immediately with a direction that the shares of the Hoff children and Mrs. Martin and Mrs. Bower shall remain charged with their interest, on the three devises of his real estate (two to Adam and one to Charles Lehr, nephews), until paid accordingly to his will. Then follows this provision: "Regarding the second devise to my nephew, Adam Lehr, of the sixty-six acres and seventy-seven perches *and my nephew, John Lehr, his brother*, I do hereby give and bequeath, order and direct as follows—that is to say, after deducting from the amount of the valuation I have put upon the lands embraced in that devise the aggregate of the sum of money already charged on said lands, the said Adam shall pay annually unto his said brother John, during his lifetime, the interest on the residue of said valuation, at six per cent. per annum, and at the death of said John shall pay the principal of said residue unto the children of said John, or their descendants living at his death, and if there be none such, then the principal to go to the descendants of my brother John then living, excluding the descendants of Lucinda Hoff, and be distributed in their case in the manner hereinbefore directed as to the remainder of my estate." HELD that John was entitled to a full share absolutely of all the other part of the testator's entire estate, in addition to the amount charged on Adam's tract No. 2.—*Lehr's Appeal*, 63.

8. Where H. by her will gave to S. $1,000 "to be paid by her to her son T. when he shall have attained the age of twenty-one years." HELD, that the interest thereon belonged to S. until T. reached that age.—*Sill v. Rogers*, 185.

9. A remainder is vested at any time when it is capable of taking immediate effect in possession if the particular estate should cease.—*Boyer v. Smith*, 110.

10. It is the present capacity of taking immediate possesion if the life tenant were dead, and not the certainty of outliving him, that makes a remainder vested.—*Ib.*

11. A testator devised his real estate to his six daughters for life, and "at the death of my said

daughters or any of them, the share of said daughter or daughters to go and be vested in the child or children of said daughter or daughters respectively, in fee simple, to be equally divided between the children of my said daughters as tenants in common." He then provided for the appointment of commissioners to report partition among his six daughters, and concluded as follows: "Which report when so made shall vest in severalty in each and every of my said daughters and their respective children the purpart and share of my real estate to be so chosen by said daughters." HELD, that the grandchildren took vested remainders in fee.—*Ib.*

11½. A testator directed that his children were "to have share and share alike v. e. equally." Afterwards he provided that "all of what is left of Mary A. Brougher's legacy now inter-married with George Mummert, after her death to fall back to said Mary A. Brougher's brothers and sister or their heirs. HELD, that Mary took a fee simple and not merely a life estate.—*Brougher's Estate*, 78.

EXECUTION OF.

12. The two witnesses to a will need not be *subscribing* witnesses—that is, they need not sign their name, as witnesses to the instrument itself—but each witness must prove all the facts necessary to constitute the due and formal execution of the paper.—*Ness v. Ness*, 27.

13. The testimony of a witness who swears to the execution and identity of a will, is not to be rejected as incompetent and insufficient in law, because he is unable to designate any peculiarity in the testator's mark or signature, or in the paper upon which the will is written.—*Ib.*

LEGACIES. PAYMENT OF.

14. The general rule of law is that where legacies are given, payable at a time specified, they carry no interest before that time.—*Sill v. Rogers*, 185.

15. Where, however, the legatee is a child of the testator or dependent on him, and no other provision is made for his support, the rule is otherwise.—*Ib.*

WITNESS. See DECEDENT'S ESTATE, 6-8; EVIDENCE, 2-3; WILL, 12-13.

WORDS. CONSTRUCTION OF.

"SALARY." LEGISLATURE, 1.

1. The word "Salary," as used in the Constitution (Art. II, Sec. 8) of 1874, is to be accepted in its ordinary and popular sense, and means a fixed sum paid for a term of service.—*The Commonwealth of Pennsylvania ex rel. Charles S. Wolf vs. Samuel Butler, State Treasurer*, 93.

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